92-1981

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STEVEN D. WIENER, et al.,

Petitioners,

v.

NATIONAL CITY, a municipal corporation; and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an adult entertainment zoning ordinance violates the free speech guarantees of the First and Fourteenth Amendments and the principles of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (requiring that such ordinances must, at the least, allow a "reasonable opportunity to open and operate an adult [business] within the city"), where:

a. the combination of specific and general zoning restrictions applicable to an adult bookstore allow virtually *no* legally permissible locations for such a business within the city;

b. it requires separation distances between unrelated adult businesses and between adult businesses and "sensitive" uses which are far greater than any previously approved by this Court, and in the absence of any studies of its own or of any other city to suggest that the adverse secondary effects of some of these businesses (including petitioners') extend nearly so far;

c. it waives these otherwise totally preclusive distance restrictions if and only if adult uses locate only within enclosed shopping malls, and the evidence at trial clearly established that none of the city's three existing qualifying malls would rent to any adult business, and the evidence also demonstrated that malls of this type generally will not rent to any adult businesses because of a perceived incompatibility with their family-oriented tenants; and

QUESTIONS PRESENTED – Continued

d. the evidence at trial also established that the cost of building a qualifying mall of one's own was so enormous that no reasonable business person would consider doing so simply to open an adult business?

2. Whether the city's ordinance constitutes the type of pretextual use of the zoning power condemned by this Court in dictum in *Young*, 427 U.S. at 84, and more recently in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), particularly given the fact that enclosed shopping malls are generally one of the *most likely places* where one might find families and unsupervised minors, yet that is the only place where the city has chosen to allow adult entertainment businesses?

3. Where the inevitable effect of an ordinance is to say that those engaging in a certain type of expression may *only* operate subject to the whims of private and unrelated mall owners, does such an ordinance violate the First Amendment by impermissibly transferring public control to private groups who are free to impose unlimited censorship and who are known to have interests adverse to the expressive interests of petitioners. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)?

4. By singling out "adult entertainment" businesses as the *only* types of businesses which may not operate out of their own free-standing commercial building, does the ordinance violate the requirement of *Renton* that adult business owners be allowed to compete "on an equal footing with other prospective purchasers and lessees?"

LIST OF PARTIES

Petitioners Steven D. Wiener, Steven D. Wiener d/b/a Chuck's Bookstore, and Patricia Saunders are the only petitioners herein, and were also the only respondents when this matter was before the California Supreme Court.

Respondents herein are the City of National City, California and People of the State of California. They were the only appellants below.

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OPINIONS BELOW

The original opinion of the California Supreme Court herein is reported as *City of National City v. Wiener*, 3 Cal.4th 832, 12 Cal.Rptr.2d 701, 838 P.2d 223 (1992), and is printed in Appendix A; that court's presently unpublished order of January 21, 1993, modifying its opinion (in response to petitioners' request for rehearing) is printed in Appendix B; the court's order denying rehearing is printed in Appendix C. The unpublished decision of the California Court of Appeal for the 4th Appellate District is reproduced in Appendix D. The trial court, the Superior Court for the County of San Diego, entered a Judgment Granting Permanent Injunction,

printed in Appendix E. The trial court's Statement of Decision is printed in Appendix F.

JURISDICTION

Following a final judgment below, the California Supreme Court entered its opinion in this case on October 29, 1992. In response to petitioners' request for rehearing, that court entered an order on January 21, 1993, modifying certain aspects of its opinion. On that date, it also denied the petition for rehearing. On April 12, 1993, this Court extended the date for the filing of this petition until May 21, 1993. (Appendix G.) This Court therefore has jurisdiction under 28 U.S.C. § 1257(a) from the final judgment rendered by the highest court of a state in which a decision could be had.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the following constitutional provisions and ordinances are reproduced in Appendix H:

United States Constitution, Amendment I

United States Constitution, Amendment XIV

Chapter 18.69 of the National City Municipal Code (as amended 1987)

STATEMENT OF THE CASE

At all relevant times, petitioners have owned an "adult bookstore" in National City, California. The City of National City ("City") initiated this lawsuit in 1986 by filing a Complaint (Appendix I) against petitioners in the

San Diego Superior Court[1] asserting two distinct causes of action: one for abatement of a violation of its adult zoning ordinance (an alleged "statutory nuisance") and one for abatement of a "common law public nuisance" consisting of inappropriate conduct allegedly engaged in by petitioners' patrons. The Complaint sought abatement on *both* nuisance theories.

The trial court granted a preliminary injunction against further zoning violations, but did *not* issue any preliminary relief against customer misconduct. The California Court of Appeal reversed on the ground that the ordinance *then* in effect was unconstitutional.

Thereafter, the City amended its ordinance, and the case went to trial based upon the ordinance as presently written, *i.e.*, National City Municipal Code ("N.C.M.C.") § 18.69.030. (Appendix H.) In pertinent part, that ordinance states:

> "**18.69.030**
>
> "A. No person . . . shall own, [or] operate . . . any . . . adult entertainment establishments . . . within one thousand five hundred feet of another adult entertainment establishment or within one thousand five hundred feet of any school or public park within the city or within one thousand feet of any residentially zoned property. . . .
>
> "B. . . . .
>
> "C. Nothing in this chapter prohibits the location of adult entertainment establishments within retail shopping centers in all commercial zones **wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view** from public streets, parks, schools, churches or residentially zoned

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[1] *People of the State of California and City of National City v. Wiener, et al.*, San Diego Superior Court No. 578784.

property." (Emphasis added.) [A more complete copy of the ordinance is printed in Appendix H].

Substantial evidence was adduced at trial demonstrating the impact of the ordinance on adult entertainment businesses. Initially, City Planning Director Roger Post testified that in November of 1982 there were only two adult bookstores and one adult theater in National City [RT 95/3-13], but that at the time of trial herein, there was only one adult theater and one adult bookstore [RT 95/17-22], *i.e.*, petitioners'.[2]

With reference to the ordinance's linear distance restrictions,[3] Planning Director Post conceded that "once you draw out these distances from the parks, from the schools, from the residentially zoned areas, there is not a lot of area left that adult entertainment could conceivably locate in." [RT 79/1-4.] He also testified that the City consists of 5,536 acres in area [RT 86/12-21], of which 572 acres are zoned for commercial purposes [RT 85/16-20], and of which only one 4.5 acre parcel (at 35th St. and National City Blvd.) was in accordance with the ordinance's linear distance restrictions for adult entertainment businesses. [RT 91/17-28; RT 106/21-107/11.] Another witness for the City, commercial real estate broker Linda Greenberg, disagreed, testifying that the parcel "is approximately one acre . . . and is currently occupied by . . . a Yamaha motorcycle dealership." [RT

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[2] He also testified that the City is experiencing urban blight, but did not attribute the primary cause to the presence of adult entertainment businesses. Instead, he stated that "National City . . . is beginning to wear out." [RT 59/23-60/1.]

[3] *I.e.*, the requirements that adult businesses may not be within 1,500 feet of any other adult business nor within 1,500 feet of any school or public park, nor within 1,000 feet of any residentially zoned property.

167/1-6.] She based her estimate of one acre on an official parcel map prepared by the County Assessor. [RT 167/7-12.]

It was also uncontroverted that since the ordinance prohibits more than one adult entertainment business in a 1,500 foot radius, this one parcel of legally permissible, although unavailable, land could have lawfully housed no more than a maximum of one adult entertainment business.

There was also substantial testimony concerning the aspect of the ordinance which waived its linear distance restrictions if an adult business is located in an enclosed shopping mall.[4] Commercial Real Estate Broker Tony Solis, a defense witness, testified uncontrovertedly that there were only three presently existing retail shopping centers which qualified under the exception of N.C.M.C. § 18.69.030-C. [RT 271/16-272/4.] He further testified that he had made his own investigation as to whether those three shopping centers would rent space to an adult entertainment business and stated that none of them was willing to do so. *Id.* Again, the City offered no controverting evidence.

Solis also testified, consistent with the testimony of the City's real estate expert, Linda Greenberg, [RT 188/8-21] that it is "generally known" by commercial real

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[4] As noted above, N.C.M.C. § 18.69.030-C waives the linear distance restrictions of § 18.69.030-A if adult entertainment establishments are located "within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property."

estate people that *no* retail shopping mall would ordinarily rent to an adult bookstore.[5] [RT 272/5-17.]

Concerning the point of whether it would be feasible for one to build one's own mall in order to comply with the ordinance, Cliff Beck, a mall developer with 40 years experience, testified that the smallest economically viable "mall" would require 4 acres [RT 305/23-27]; that the typical regional shopping center mall would require a minimum of fifteen acres [RT 205/28-306/2] and that the minimum price for developing the smallest viable shopping center that would meet the ordinance's requirements "would be about six and a half million dollars." [RT 308/23-24.]

The City presented two witnesses regarding the "mall" exception. Planning Director Post admitted that it was a "community objective to [restrict] adult entertainment establishments in National City to a minimum level within constitutional bounds" [RT 94/20-23], and that the

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[5] California Supreme Court Justice Mosk, in dissent, made the following observation regarding the witnesses' statements on this point:

> "At times the witnesses seemed bemused or incredulous at the kinds of questions they were being asked, because the shopping centers' unwillingness to rent to an adult bookstore seemed self-evident to them. Solis testified:
>
> "Q. In your experience in the commercial real estate business, is it expected that retail shopping centers such as the ones I've mentioned would not rent to adult entertainment businesses?
>
> "A. That's correct. They ordinarily wouldn't rent.
>
> "Q. Would not rent?
>
> "A. Would not rent to an adult bookstore.
>
> "Q. And is that generally known by people who are in the commercial real estate business?
>
> "A. Well, if you don't know it, you'll soon find out." 12 Cal.Rptr.2d at 717, n. 6; (App. A - 39, n. 6).

sole reason the City enacted the "shopping mall" exception in § 18.69.030-C, was to prevent the ordinance from being found unconstitutional due to its otherwise clearly overly restrictive impact on permissible locations for adult businesses. [RT 97/14-98/12.] He conceded that there were only three existing malls in National City where an adult entertainment business could lawfully locate and explained that the term "mall" as used in this ordinance, is a reference to "shopping centers containing pedestrian malls". [RT 75/3.] Post testified that "[a] mall, by definition, is a very inward looking configuration of buildings. There is a pedestrian walkway. The businesses take access off that walkway." [RT 75/7-9.] "It wouldn't be the driveway, pull-over-and-walk-in type of situation. You have to know where you are going, park the car, walk through the mall." [RT 75/11-13.]

Post also testified that it was "not [his] job" to inquire whether any of the three malls would be willing to rent space to an adult business. [RT 100/2-8.] When asked whether it wasn't "well-known amongst yourself and the other people on your commission that anybody who owned one of these enclosed large shopping center malls wouldn't rent to an adult business?" [RT 100/10-13.], he responded, "No. That's not true at all"; at which point he was asked: "Well, then you just didn't know and didn't inquire?" He answered "That's right." [RT 100/10-17.] Another City witness, however, real estate broker Linda Greenberg, acknowledged "that a knowledgeable retail broker or leasing agent would surmise . . . that it would not be an optimum choice to have adult entertainment within the center." [RT 188/8-21.]

Planning Director Post testified that the only other way in which an adult entertainment business could legally operate in National City would be to *build* its *own* mall and place its own store therein [RT 82/17-27], and

that the City had *intended* that adult entertainment businesses would be the *only* types of businesses which would have to build their own mall in their own retail shopping center in order to have a place to operate. [RT 101/6-104/1.]

On August 18, 1989, the trial court issued its Statement Of Decision (Appendix F) permanently enjoining "the continued operation of defendants' adult bookstore," but issuing no relief vis a vis the "common law" nuisance (*i.e.*, customer misconduct) (App. F-1). The Statement Of Decision contained a specific finding that "[i]f one excludes shopping centers, and undeveloped commercial land, **there is only one site available which conforms to the ordinance. This location is at 1 West 35th Street and is presently rented.**" (Emphasis added.) (App. F-7.) The court nonetheless upheld the ordinance on the theory that it was saved by the shopping mall exception, and that any arguments to the contrary were refuted by this Court's opinion in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). (App. F-9-12.)

At an August 28, 1989, hearing for the purpose of finalizing the trial court's Statement Of Decision, the trial court candidly expressed its viewpoint concerning the constitutionality of the zoning law:

> "[D]uring the trial of this action it was my feeling . . . that this was, *de facto, [a] prohibition of presumptively First Amendment protected rights. There was no doubt in my mind from listening to the evidence.* However, as I tried to point out in the Statement of Decision, the appellate cases have a completely different view from my opinion on the matter, and the bottom line is that they say that economic considerations just don't cut it, and that's not a basis for striking down the statute, and I feel that I am bound by that. . . . " (Emphasis added.) [RT 372/11-20.]

On August 29, 1989, the trial court's judgment was entered, permanently enjoining petitioners from operating an adult bookstore at their current location. (Appendix E.) Although petitioners appealed the permanent injunction of the zoning violation, the City did not appeal the trial court's failure to enjoin any common law nuisance related to the City's allegations of misconduct by petitioners' customers.

On March 26, 1991, the California Court of Appeal, in an unpublished opinion, reversed the trial court's judgment and determined that N.C.M.C. § 18.69.030 (the adult zoning ordinance) was unconstitutional in violation of the First Amendment, concluding that the City had failed to demonstrate the existence of adequate alternative locations for such businesses. (Appendix D.)

Respondent City thereafter sought review from the California Supreme Court, both from the adverse zoning determination by the Court of Appeal, and from the trial court's refusal to abate the alleged common law nuisance (even though they had not filed any appeal to the Court of Appeal).

On May 30, 1991, the California Supreme Court granted review solely on the question of the constitutionality of the zoning ordinance. (That order is reproduced in Appendix J.) Under Rule 29.2(b) of the California Rules of Court, the parties are not entitled to argue issues to the California Supreme Court beyond those specified in its grant of review.

On October 29, 1992, the California Supreme Court issued its initial opinion in this case (Appendix A) published *sub nom. City of National City v. Wiener*, 3 Cal.4th 832, 12 Cal.Rptr.2d 701, 838 P.2d 223 (1992). That opinion was slightly modified on rehearing on January 21, 1993. (Appendix B.) By a 5-2 vote, the Court reversed the Court

of Appeal and upheld the trial court's permanent injunction abating further violations of the adult zoning ordinance. Justices Mosk and Kennard dissented, concluding that the zoning ordinance was clearly unconstitutional under the First Amendment, but concurred in the judgment on the theory that the injunction should have been upheld based upon the common law public nuisance cause of action which the trial court rejected. The five-justice majority concluded that it would be "inappropriate for us to reach the issue" of whether the trial court erred in denying an injunction to abate the alleged common law public nuisance (*i.e.* the nuisance theory based on customer misconduct). *See, e.g.*, 12 Cal.Rptr.2d at 703, n. 2 (App. A-4, n. 2), and *see* the special concurring opinion of Justice Baxter, 12 Cal.Rptr.2d at 712-714 (App. A-27-30).

The two dissenting justices strongly condemned the zoning ordinance which was approved by the majority, stating that "there can be no obstacle to the United States Supreme Court hearing the case and correcting the majority opinion's faulty constitutional reasoning." 12 Cal.Rptr.2d at 719, n. 11; (App. A-44, n. 11).

On November 16, 1992, petitioners filed a petition for rehearing in the California Supreme Court and, on November 17, 1992, filed a request for stay of the Supreme Court's remittitur pending the filing and disposition of a petition for writ of certiorari to this Court.

On January 21, 1993, the California Supreme Court issued an order modifying its opinion in four limited factual respects, but not the judgment. (Appendix B.) On that date, the Court also issued an order denying the petition for rehearing and request for stay of remittitur. (Appendix C.)

Petitioners' bookstore, Chuck's Books, has been closed since January 26, 1993, this Court having denied

its request for stay pending disposition of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

National City's adult zoning ordinance effectively bans petitioners' bookstore from operating within its borders. Though it achieves this result through a confluence of different requirements, its *de facto* ban is no less effective and total than the *de jure* ban rejected by this Court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

Because of the ordinance's various separation requirements imposed upon adult businesses, combined with its general zoning restrictions, only one parcel of land in the entire town is legally permissible for such businesses, and that parcel is presently developed and commercially utilized by a Yamaha motorcycle dealership.

While the City attempts to avoid the clear unconstitutionality of this scheme by offering a pretextual waiver of the ordinance's distance requirements if one operates their adult business in an enclosed commercial mall, the evidence clearly establishes that the practical impact of this exception provision does absolutely nothing to lessen the total *de facto* prohibition which this ordinance imposes upon adult entertainment businesses in National City. In short, the evidence clearly establishes that petitioners have been denied a "reasonable opportunity" to open and operate their bookstore in National City.

I

THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF *RENTON* AS PRECLUDING ANY CONSIDERATION OF INSURMOUNTABLE ECONOMIC IMPEDIMENTS MANDATED BY AN ADULT ZONING ORDINANCE, IS IN IRRECONCILABLE CONFLICT WITH A RECENT DECISION BY THE NINTH CIRCUIT COURT OF APPEALS, THEREBY CREATING A CONFLICT OF SIGNIFICANT DIMENSION BETWEEN THE STATE AND FEDERAL COURTS IN CALIFORNIA.

Certain language in this Court's most recent decision involving adult entertainment zoning laws (seven years ago in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)), has been a source of great confusion to lower courts and has spawned much mischief by local governments which have radically departed from and grossly perverted this Court's intent.

Specifically, in *Renton*, this Court was asked to rule that land made legally permissible for adult businesses under an adult zoning ordinance should not be considered constitutionally available if it is not *presently* available for sale or lease. Recognizing that such a holding would give adult businesses an unfair advantage over any other business (*i.e.*, a guarantee that a site would be for sale or lease), this Court understandably responded as follows:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at *bargain* prices. *See id.*, at 78 (Powell, J., concurring) ("*The inquiry for First*

> *Amendment purposes is not concerned with economic impact*"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . . " (Emphases added), 475 U.S. at 54.

Unfortunately, many lower courts have interpreted the language above as a much broader general statement that economic factors may play *no part whatsoever* in the analysis of adult zoning laws, even when an ordinance mandates economic barriers that are proven to be insurmountable by employment of all reasonable efforts. For example, the trial judge in this case candidly admitted that he initially thought this law was patently unconstitutional because it made opening an adult business in National City an economic impossibility.[6] However, Judge Di Figlia said that he then read the applicable appellate case law (*i.e., Renton*) and concluded that he was required to ignore the economic realities which prevent adult businesses from having any chance to open in *National City*:

> " . . . [T]he reason why it took so long to get a tentative decision in this case was because I was

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[6] At page 345 of the Reporter's Transcript (RT), lns. 2-4, the trial court made clear his belief that there was no remote chance that any of the three existing qualifying malls would ever rent to an adult business. Speaking to counsel for the City, he stated: **"Is there any question in your mind that not in a million years would Plaza Bonita, or Town and Country, or South Bay Plaza rent to Mr. Wiener . . . ?"** (Emphasis added.)

Similarly, at the August 28, 1989, hearing for the purpose of settling the trial court's tentative Statement of Decision, the trial court made it clear that his evaluation of the evidence presented to him was that, as a practical matter, this ordinance operated as a "de facto prohibition of presumptively First Amendment protected rights" [RT 372/12-13].

> terribly troubled by that, and during the trial of this action it was my feeling, prior to reading the cases, that this was, de facto, [a] prohibition of presumptively First Amendment protected rights. *There was no doubt in my mind from listening to the evidence.* However, as I tried to point out in the Statement of Decision, the appellate cases have a completely different view from my opinion on the matter, and the bottom line is that *they say that economic considerations just don't cut it*, and that's not a [proper] basis for striking down the statute, and I feel that *I am bound by that*, and *that was the basis of [my] ruling. . . .* " (Emphases added), RT 372/9-20.

Accordingly, since the trial judge made clear his absolute conviction that no adult business would *ever* be allowed to open in any of the three existing malls (see previous note), his upholding of the ordinance was clearly and exclusively premised on his belief that the economic obstacle of having to build one's own mall in order to open an adult business, was not constitutionally cognizable under *Renton*.

The California Supreme Court adopted essentially the same interpretation of *Renton*:

> "Respondents contend, however, that the availability of sites under the ordinance is "illusory" because of the lack of sites currently for rent, the unwillingness of owners of available sites to rent to them, and the considerable cost of building their own shopping center in compliance with the ordinance. We find none of these arguments establish constitutional infirmity.
>
> "The high court in *Renton* made clear that 'The inquiry for First Amendment purposes is not concerned with economic impact.' " *City of National City v. Wiener*, 12 Cal.Rptr.2d at 711 (App. A-23).

In sharp contrast, the United States Court of Appeals for the Ninth Circuit recently came to the exact opposite conclusion in reviewing a preliminary injunction based upon the possible unconstitutionality of the City of Los Angeles' adult entertainment zoning law. *Topanga Press, Inc. v. City of Los Angeles*, 9th Cir. No. 91-55865 (as modified on April 27, 1993).[7] That court first provided the following analysis of this Court's "economics" language in *Renton*:

> "[*Renton's*] prohibition against consideration of economic impact specifically forecloses inquiry into whether a relocation site is "commercially viable" or only "potentially" as opposed to "actually" available.[8] *Id.* at 53.
>
> "The Supreme Court, however, has not stated what sort of factors *may* be considered when deciding whether the relocation sites provided by a city are reasonable. Some courts have attempted to draw a distinction between economically unsuitable land and physically or practically unsuitable land. *See Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir.) (per curiam) *modifying* 950 F.2d 255 (5th Cir.), *cert.*

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[7] A copy of this opinion is reproduced in Appendix K. However, the *Topanga Press* decision is not yet final as both sides to that litigation have expressed an interest in filing a petition for rehearing and have sought an extension of the deadline for doing so. As counsel of record in *Topanga Press*, counsel for petitioners will promptly apprise this Court of any and all further developments in that case.

[8] While petitioners agree that *Renton* precluded inquiry into whether a truly "potentially available" site is "actually available," they strongly take issue with the Ninth Circuit's assertion that *Renton* foreclosed inquiry into whether a relocation site is "commercially viable." "Commercial viability" measures whether a site is of the type that could *ever* be feasible for use by *any* business of the type asserting the challenge. That issue simply was not ruled on in *Renton*.

denied, 113 S.Ct. 304 (1992); *Alexander v. Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991). In *Woodall*, the Fifth Circuit held that "land with physical characteristics that render it unavailable for any kind of development . . . may not be considered available for constitutional purposes under *Renton*." 959 F.2d at 1306.

"The problem, however, is that the distinction between economically unsuitable and physically or practically unsuitable land is difficult to maintain. Nearly all forms of physical and legal unsuitability may be couched in terms of economic unsuitability. Conversely, problems of economic suitability may be couched in terms of physical unsuitability. For example, in the instant case, some of the definitionally "available" land is currently used as runways for the Los Angeles airport. One could argue that this land is physically unsuitable for a business. On the other hand, one could argue that it is merely economically unsuitable, since there is nothing to prevent an adult business from physically relocating to this site; rather it is prevented by a consideration of the cost of tearing down part of an airstrip and then building a storefront. In short, it could be argued that the only impediment is the cost of development.

"This easily blurred line between economic and physical suitability creates doctrinal problems. If the unsuitability of a relocation site always can be couched in terms of economic suitability, under *Renton* no relocation site could ever be considered unreasonable. On the other hand, if a court attempts artificially to maintain the line between physical and economic suitability, it may often be led to consider the economic factor *sub rosa*. . . . " App. K, 8-10.

Concluding that *Renton* could not possibly have intended courts to blind themselves to the types of economic realities it had just described, the Ninth Circuit then fashioned a new test (albeit one which petitioners herein do not entirely endorse):

> "A solution to this gordian knot appears once we consider the context in which the *Renton* court forbade consideration of economic factors. Astutely, the *Woodall* court noted that '[t]he Court [in *Renton*] obviously contemplated that there was a 'market' in which businesses could purchase or lease real property on which business could be conducted.' 959 F.2d at 1305. We agree with the observation of the *Woodall* court. *Renton* assumed that the relocation sites were already part of the relevant real estate market. * * *
>
> *"Accordingly, we do not think that Renton forbids a court to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market."* (App. K-10), emphasis added.

Petitioners believe the Ninth Circuit was unquestionably correct in concluding that this Court, in *Renton*, never intended lower courts to ignore *all* economic considerations arising in adult entertainment zoning. In sharp contrast, the California Supreme Court's opinion forbids *any* consideration of even the most insurmountable economic barriers, thereby giving municipalities *carte blanche* to enact any ordinance that gives the facial appearance of providing locations while imposing insurmountable practical barriers that insure a total and effective *de facto* ban of such businesses.[9]

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[9] To show that there are municipalities anxious to take advantage of this total removal of restraints on them, petitioners

For example, under the reasoning of the California Supreme Court, a court would be forced to uphold a zoning ordinance which allowed adult businesses anywhere they wanted to locate throughout an entire town, *but only if they were located 150 feet under ground!* Such an ordinance would impose no *legal* barriers, only insurmountable *economic* barriers. In contrast, under the holding of the Ninth Circuit in *Topanga Press*, the economic unfeasibility of such locations would preclude them from being considered as part of any relevant commercial real estate market and, as a result, the ordinance would have to be found unconstitutional.

As revealed by the discussion above, there are compelling reasons for this Court to grant review herein and provide much needed clarification to the state and lower federal courts concerning the appropriate method for dealing with the economic factors which, if left completely out of the analysis, will unquestionably allow cities (as demonstrated by the case at bar) to effectively deny all adult business owners a reasonable opportunity to find any location in which to establish such a business.

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have printed (in Appendix H-7) a copy of the adult zoning ordinance of the City of Escondido, California. That ordinance specifically restricts adult businesses only to specifically designated shopping centers at addresses where the City no doubt is aware that adult businesses could not find locations, either because the centers are fully occupied by businesses subject to long-term leases, such as specifically named supermarkets, etc., or because of the very common situation where a shopping center will have a clause in its master leases forbidding operation of adult businesses.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT UPHOLDING THIS ORDINANCE ALSO CONFLICTS WITH NUMEROUS PRIOR DECISIONS OF THIS COURT.

A. The California Supreme Court's Upholding Of This Ordinance Conflicts With The Method Of Analysis This Court Has Established For Determining Whether An Ordinance Is A Valid Time, Place And Manner Restriction.

The California Supreme Court's opinion herein is also in conflict with this Court's constitutional pronouncements regarding time, place, and manner restrictions on presumptively protected expression. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court reiterated the familiar principle that "government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " 491 U.S. at 792. National City's ordinance satisfies none of these criteria.

(1) The California Supreme Court's opinion conflicts with the requirements of *Renton*, *Schad* and *Young* that these ordinances must not significantly restrict the overall availability of locations for such businesses and must, at a minimum, provide adult businesses with a "reasonable opportunity" to "open and operate" within the city.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), a majority of this Court first held that special

zoning restrictions could be imposed upon businesses defined by the content of their speech (*i.e.*, adult entertainment businesses), but only after carefully pointing out that the ordinance in that case did not have the effect of "greatly restricting access" to outlets for sexually oriented expression within the City of Detroit. 427 U.S. at 72, n.35.[10] In contrast, in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), this Court struck down a zoning ordinance which allowed no locations whatsoever for businesses, including adult businesses, featuring live entertainment.

Most recently, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court held that adult entertainment zoning ordinances should be evaluated under the tests applicable to time, place, and manner restrictions. 475 U.S. at 46. Regarding the critical alternative avenues of communication aspect of the test, this Court held that the appropriate constitutional inquiry was whether the ordinance allowed "a reasonable opportunity to open and operate an adult theater within the City." 475 U.S. at 54.

While the California Supreme Court purportedly acted under the compulsion of *Renton*, in fact, it clearly ignored the most fundamental safeguard for protected

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[10] Comparing the effect of the ordinance upheld in *Young* and the ordinance upheld here by the California Supreme Court, starkly demonstrates the extent of the conflict between these two opinions. The *Young* ordinance did not cause "any significant overall curtailment of adult [businesses] in Detroit" (427 U.S. at 79); "[v]iewed as an entity, the market for this commodity [was] essentially unrestrained." 427 U.S. at 62. Conversely, National City's ordinance, as characterized by the trial judge, effected "*de facto*, [a] prohibition of presumptively First Amendment protected rights." [RT 372/11-20.]

expression established in that opinion, *i.e.*, the requirement that the ordinance must at least provide "a *reasonable* opportunity to open and operate an adult [business] within the City." *Id.* Specifically, notwithstanding the trial court's candid observation that none of the existing qualifying malls would rent to petitioners "in a million years," the California Supreme Court apparently upheld the ordinance on the theory that one desiring to open an adult business could always acquire the necessary property and build one's own complying mall. Although the only competent evidence on this point established that it would require a minimum of $6.5 million and enormous amounts of time to acquire the minimum type of structure necessary to comply with the ordinance, the court dismissed this evidence as 'economically irrelevant' under *Renton*, concluding that the entirety of the city's 572 acres of commercially zoned land was 'available' to petitioners.[11] (App. A-23.)

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[11] The court also asserted that petitioners could attempt to lease the only parcel in the city that was permissible under the ordinance – which the court conceded was already developed (and which was commercially occupied by a Yamaha motorcycle dealership) (App. A-26), or could somehow "modify" some unspecified existing structures to somehow achieve compliance. However, there was no evidence in the record to demonstrate the feasibility of doing so *at any cost*, much less in a commercially reasonable manner. However, proof of the economic feasibility of the "modification" method for compliance was irrelevant for the California Supreme Court given its interpretation of *Renton*.

In any event, this Court is, of course, free to make its *own* determination of whether the facts presented at trial demonstrated viable or "reasonable" options for an adult business. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 501 (1984).

However, as observed by dissenting Justice Mosk, the only possibility of compliance with the ordinance would consist "of new construction that would fulfill the City's concealment requirements." (App. A-39.) Justice Mosk detailed how petitioners' expert witness, Clifford Beck, a redevelopment consultant with 40 years construction experience in shopping centers and an expert in mall development, testified that it would not only cost $6.5 million to build the minimal mall that would meet the ordinance's requirements, but, in uncontradicted testimony, also stated that "it would require 2 to 5 years merely to assemble the property . . . and financing needed to build the most uncomplicated and minimally sized mall that would meet the City's rules." (App. A-40.) Justice Mosk concluded that "[petitioners] proved that the City had effectively denied [them] 'a reasonable opportunity to open and operate an adult [business]. . . . ' " (App. A-40.) "To reach any other conclusion is to ignore commercial reality as well as the First Amendment's command." *Id.*

For the reasons stated in Justice Mosk's dissenting opinion, the California Supreme Court unquestionably erred in concluding that the National City ordinance provided petitioners a "reasonable" opportunity to open and operate their business within National City.

(2) Neither the ordinance's imposition of unique and unusually lengthy separation requirements for adult businesses, nor its requirement that they be located, if at all, only in enclosed shopping malls, meets *either* the "reasonable fit" test, or the more stringent "narrow tailoring" test of *Frisby v. Schultz* and *Ward v. Rock Against Racism*, and therefore the ordinance fails as a content-neutral time, place and manner restriction.

(a) There is a need for this Court to address the relevant test for "narrow tailoring."

Even if a time, place, or manner restriction leaves open adequate alternative channels of communication, this Court has consistently held that it will be invalidated if it is not "narrowly tailored to serve the government's legitimate content-neutral interests." *Ward, supra*, 491 U.S. at 798. In *Ward*, this Court rejected the notion that "narrow tailoring" required use of the "least-restrictive or least-intrusive" means of regulation, but nonetheless, at pp. 799-800 of its opinion, approved an explanation of "narrow tailoring" it had given one term earlier [in *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)], stating that "[a] complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* However, in the sentence which immediately precedes that language from *Frisby*, this Court stated:

> "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby, supra*, 487 U.S. at 485.

The only conclusion that can be drawn from these seemingly divergent statements is that, while "least-

restrictive means analysis" is not a constitutional requirement in time, place, and manner restrictions, nonetheless this Court will carefully scrutinize any restrictions to ensure that a prohibitory provision goes no further than is necessitated by the purposes underlying the ordinance.[12]

In the present case, the California Supreme Court upheld both the *de facto* requirement that adult businesses may only exist in enclosed shopping malls and the imposition of enormous separation requirements between two adult businesses, between adult businesses and residential zones, and between adult businesses and "sensitive uses," after concluding that these restrictions were "narrowly tailored" simply because "substantial government interests . . . would be achieved less effectively absent the regulation," 12 Cal.Rptr. at 710 (App. A-21), citing *Ward, supra*. However, if this were truly the only applicable test, virtually *any* enormously overbroad regulation would be approved notwithstanding the fact that it could represent tremendous overkill.[13]

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[12] Also relevant here is this Court's statement in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), that the test for analyzing the validity of commercial speech regulations is "substantially similar" to the test for analyzing the validity of time, place, and manner restrictions upon protected speech. 492 U.S. at 477. In *Fox* and other recent commercial speech decisions, this Court has proclaimed the relevant test to be that of a "reasonable fit" between the legitimate purposes underlying the ordinance and the scope of the prohibition or regulation. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 61 U.S. Law Week 4272, 4273 n.12 (1993). *Cf. Edenfield v. Fane*, ___ U.S. ___, 61 U.S. Law Week 4431, 4433-4434 (1993).

[13] For example, if one took this language from *Ward* literally and in isolation from the rest of the opinion, one would have to conclude that an ordinance imposing a 10 mile separation requirement between adult uses or an adult use and a

This Court should grant review to make clear that this particular language in *Ward* was not meant to be used in isolation from *Ward's* balancing language which relied on *Frisby v. Schultz*, nor in isolation from the comparable language from the commercial speech cases regarding a "reasonable fit."

(b) This case presents a classic example of the pretextual use of municipal powers for the true purpose of eliminating a particular type of speech business.

In *Young*, this Court held that ordinances of this type will not be upheld if cities use "the power to zone as a *pretext* for suppressing expression."[14] Here, this Court is

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residential zone, was "narrowly tailored." Indeed, even an outright *ban* on *all* adult businesses throughout an entire town could be said to be "narrowly tailored" if the only requirement is that a "substantial governmental interest . . . would be achieved less effectively absent the regulation." *Id.*

[14] Concurring opinion of Justice Powell, 427 U.S. at 84 (emphasis added). Moreover, although Justice Powell's opinion did not differ markedly on this point from that of Justice Stevens' plurality opinion, to the extent that there may be any difference in them whatsoever, Justice Powell's opinion represents the holding of this Court pursuant to the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), which states: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .' " (Citation omitted.)

See also the concurring opinion of Justices O'Connor and Stevens in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), similarly concluding that "[i]f, however, a city were to use a . . . statute as a pretext for closing down a bookstore . . . because of the perceived secondary effects of having a

faced with a classic pretextual use of the zoning power. Because the City knows that by limiting adult businesses to enclosed shopping malls it can assure that none will open, it is totally unconcerned with the fact that it has forced them to exist, if at all, in one of the *most likely places* where there will be families and unsupervised children. Under the guise of preventing content-neutral adverse secondary effects, the City has passed an ordinance which is not in any way narrowly tailored to address those asserted concerns but, instead, insures that *no* adult business will be able to become established in National City.

While petitioners do not dispute that *some* zoning restrictions of this type would be reasonable to prevent the very types of effects alleged to have occurred in this case, there is simply no reasonable fit between the problems which needed to be addressed (*e.g.*, a possible nuisance for nearby residential neighbors in the same block as this business), and the "remedies" invoked to cure the problem (*i.e.*, that adult businesses must be 1,500 feet apart from each other and from "sensitive" uses and, essentially, could locate nowhere other than in fully enclosed shopping malls).

In its attempt to justify this ordinance as a content-neutral time, place and manner restriction, the California Supreme Court stated:

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purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." As was the case with Justice Powell's necessary concurrence in *Young*, the concurring opinion of Justices O'Connor and Stevens in *Arcara* also represents the holding of the Court because the votes of those two justices were essential to the judgment in that case and represented the narrowest position in support of the judgment.

> "This configuration reduces the secondary effects associated with adult businesses by segregating such businesses away from residential areas and schools, and placing them *in a location where they do not affect the moral climate of the community as a whole.*" 12 Cal.Rptr. at 710; (App. A-21). (Emphasis added.)

In sharp contrast, Justice O'Connor, speaking for a majority of this Court[15] in *Boos v. Barry*, 485 U.S. 312, 321 (1988), stated the following:

> "We spoke in [*Renton*] only of the *secondary effects* of speech. . . . So long as the justifications for regulation have nothing to do with content . . . , we concluded that the regulation was properly analyzed as content neutral.
>
> "Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the City's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate." *Boos v. Barry*, 485 U.S. at 320-321.

Accord, Forsyth County, Ga. v. Nationalist Movement, ___ U.S. ___, 112 S.Ct. 2395, 2403-2404 (1992).

Following its clearly impermissible consideration of the "secondary effect" of damaging "the moral climate of the community," the California Supreme Court then attempted to retreat somewhat from this obviously incorrect basis of decision:

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[15] Justices Brennan and Marshall, though not joining in all of this part of Justice O'Connor's opinion, specifically stated that they agreed with the portion of it set forth above. *See Boos v. Barry, id.* at 334.

> "Specifically, it decreases the problems of harassment of neighborhood adults and children, littering of sexually explicit reading material and paraphernalia, loitering, and visual blight from bright colors and explicit signage associated with adult businesses." 12 Cal.Rptr. at 710; (App. A-21-22).

While petitioners concede that some of their store's patrons *did* regrettably cause some occasional adverse secondary effects *on their nearest neighbors,*[16] the imposition of a 1,500 foot separation requirement from so-called "sensitive" uses (*three times greater* than those employed by Los Angeles and many other cities) in the absence of any studies or evidence to show that the secondary effects of even the most poorly-run businesses of this type have anywhere near that far-reaching an impact, makes it clear that this was a content-based, not a content-neutral, ordinance.[17]

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[16] Petitioners do *not*, however, concede that the entirety of the allegations of customer misconduct asserted at trial were all true or without exaggeration. The trial Judge, sitting as trier of fact, obviously had his own doubts about the total trustworthiness of all the evidence presented on this point because, while his Findings of Fact concluded that *some* misconduct had obviously occurred, he was not sufficiently convinced to issue the requested injunction for prevention of a common law nuisance. *See* Appendix E.

[17] Even in the commercial speech context this Court held that its decisions require "a 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit . . . that represents not necessarily the single best disposition but one whose scope is *in proportion to the interest served.*" *City of Cincinnati, supra,* 61 U.S. Law Week at 4273, n.12. "[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Id.* Yet, no attempt was made whatsoever to demonstrate a reasonable fit between the 1,500 feet separation requirements and the sup-

B. The California Supreme Court's Opinion Conflicts With The Requirement Of *Renton* That Ordinances Must Treat Adult Businesses On An "Equal Footing" With Other Businesses.

Simply stated, under National City's ordinance, adult entertainment businesses are uniquely handicapped by being the *only* types of businesses in the entire city which may not operate in their own free standing building. While petitioners do not demand "special treatment," this Court should grant review to determine whether this ordinance treats them on at least an "equal footing" with other businesses as required by *Renton*, 475 U.S. at 54.

C. The Opinion Below Conflicts With This Court's Decisions Prohibiting Government From Making The Exercise Of First Amendment Rights Dependent On The Discretion Of Private Citizens, And Particularly Private Citizens With Hostile Economic Interests.

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), this Court addressed some of the constitutional dangers where government confers upon private citizens the power to restrict *any* rights or privileges of other citizens. (In that case the right or privilege was to obtain a liquor license.) The Court found it unnecessary to address the constitutionality of such a scheme in the abstract, however, concluding that the law was invalid under the First Amendment's Establishment Clause because it gave this veto power to private *religious* groups.

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posed problem to be solved, that of a nuisance for the nearest neighbors surrounding these businesses. There was certainly no attempt to present any studies or otherwise demonstrate that the 500 foot restrictions imposed by many cities are inadequate as a *complete solution* to the asserted problems.

In the present case, the California Supreme Court expressly found that the City's purpose in creating the "shopping mall exception" was to "shift[ ] part of the regulatory burden to the private sector." 12 Cal.Rptr.2d at 710; (A-22). Where, as here, the rights which the City would subject to the control (or suppression) of unrelated private individuals are rights of free expression, the rights threatened merit an even higher degree of protection than the right to sell liquor threatened in *Larkin*. Accordingly, if for no other reason, this Court should grant review to explore the constitutionality of this novel and uniquely dangerous threat to First Amendment freedoms.

CONCLUSION

For all the reasons above, this Court is respectfully urged to issue a writ of certiorari to the Supreme Court of California.

DATED: May 21, 1993

Respectfully submitted,

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APPENDIX A

CITY OF NATIONAL CITY,
Plaintiff and Appellant.

v.

Steven D. WIENER et al., Defendants and Respondents.

No. S020887.

Supreme Court of California,
In Bank.

Oct. 29, 1992.

Modified on Jan. 21, 1993
1993 WL 13992

Municipality brought action to enjoin continued operation of adult bookstore in alleged violation of municipal ordinance. Owners of bookstore defended based on alleged unconstitutionality of ordinance. The Superior Court, San Diego County, No. 578784, Vincent P. Di Figlia, J., entered judgment in favor of city, and defendants appealed. The Court of Appeal reversed. Review was granted, superseding the opinion of the Court of Appeal. The Supreme Court, Arabian, J., held that: (1) municipal ordinance prohibiting any adult entertainment business from locating within 1,000 feet of residentially zoned property, unless it was located within enclosed mall, qualified as content-neutral time, place and manner regulation, and (2) ordinance provided defendants with "reasonable alternate avenues of communication."

Judgment of Court of Appeal reversed; matter remanded with instructions.

Baxter, J., concurred and filed opinion.

Mosk, J., concurred in part and filed opinion in which Kennard, J., joined.

Norman R. Atkins, Weston & Sarno, John H. Weston and G. Randall Garrou, Beverly Hills, for defendants and respondents.

George H. Eiser III, City Atty., and Linda Kaye Harter, Asst. City Atty., National City, for plaintiff and appellant.

John W. Witt, City Atty., San Diego, Stuart H. Swett, Chief Deputy City Atty., Joseph M. Schilling, Deputy City Atty., David L. Llewellyn, Jr., H. Robert Showers and Gene L. Malpas, as amici curiae on behalf of plaintiff and appellant.

ARABIAN, Justice.

The question we consider is the constitutionality of a municipal zoning ordinance that regulates adult entertainment establishments. The precise issue is whether a zoning ordinance that combines both distance regulations and an exception for location of adult businesses in certain shopping malls conforms with First Amendment principles under the standard set forth in *City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (*Renton*). We conclude that the ordinance is constitutional.

I. FACTS AND PROCEDURAL BACKGROUND

City of National City (the city) is located approximately five miles from downtown San Diego. It is highly

accessible, criss-crossed by two major freeways, several major arterials, and an abundance of surface street traffic. To the west lies San Diego Bay. Its three other borders lie adjacent to property belonging to other cities and the County of San Diego. It is home to a large naval installation that significantly affects the area in terms of traffic, public resources, and crime.

The city's total area is 8.65 square miles or 5,536 gross acres. Only 3,196 acres, or 58 percent of the city's land, are available for any land use purpose whatsoever. Of those 3,196 acres, 572 acres, or 17.9 percent of the total net acres, are zoned for commercial use; 1,296 acres, or 40.6 percent, are zoned for residential use; 541 acres, or 16.9 percent, are zoned for industrial use; and 787 acres, or 24.6 percent, are zoned for institutional, including military, use.

In December 1986, respondents Steven D. Wiener, individually and doing business as Chuck's Bookstore, and his sister Patricia Sanders [sic] (respondents) opened Chuck's Bookstore, an adult bookstore and arcade, at 929 National City Boulevard in the city.[1] Shortly thereafter, the city brought an action in superior court seeking a preliminary and permanent injunction against the continued operation of Chuck's Bookstore by respondents pursuant to chapter 18 of the city municipal code regulating

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[1] Prior to opening the Chuck's Bookstore at 929 National City Boulevard, Wiener had operated another adult bookstore and arcade at 829 National City Boulevard. After the earlier store was closed by the city during redevelopment, respondents opened Chuck's Bookstore at 929 National City Boulevard, where it became the subject of the current action.

adult establishments. The city claimed that the bookstore constituted a common law and statutory nuisance,[2] and that the store was operating in violation of certain sections of the municipal code, including section 18.69.030.[3]

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[2] Although the city's action was for both statutory and common law public nuisance, the superior court's statement of decision relied solely on the statutory basis for imposing the requested injunctive relief. On appeal, the Court of Appeal also addressed only the statutory public nuisance issue and denied the city's petition for rehearing (opposed by respondents) requesting a ruling on the issue of common law public nuisance. Finally, at oral argument before this court, respondents urged the court that given what they characterized as a lack of evidence in the record on the issue of common law public nuisance, and the failure of the lower courts to rule on the issue, it would be inappropriate for us to reach the issue. Accordingly, we decline to resolve this action on the ground of common law public nuisance, and conclude that it is appropriate for us to reach the constitutional issue.

[3] Section 18.69.030 provides in relevant part:

"A. No person or entity shall own, establish, operate, control or enlarge, or cause or permit the establishment, operation, enlargement or transfer of ownership or control, except pursuant to Section 18.69.060, of any of the following adult entertainment establishments if such adult entertainment establishment is within one thousand five hundred feet of another adult entertainment establishment or within one thousand five hundred feet of any school or public park within the city or within one thousand feet of any residentially zoned property in the city, measured along street frontages:

"1. Adult bookstore; . . .

"3. Adult mini-motion picture arcade (peep shows); . . .

"C. Nothing in this chapter prohibits the location of adult entertainment establishments within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view

Respondents ultimately conceded that Chuck's Bookstore violated the ordinance by virtue of its proximity to both another adult entertainment establishment and a residential area, but claimed that section 18.69.030 was unconstitutional.

Municipal Code section 18.69.030 (the ordinance) prohibits an adult business from locating within 1,500 feet of another adult business, 1,500 feet of a school or public park, or 1,000 feet of any residentially zoned property. The ordinance limits neither the total number of adult businesses that may locate in the city, nor the hours they may operate. It "grandfathers" existing adult businesses, and hence does not apply to another adult business in the city, the Pussycat Theater.

Mr. Post, the city's Planning Director, testified that the ordinance was enacted after the city had performed a study and conducted one or more public hearings before the city's Planning Commission, and was part of a comprehensive scheme of urban redevelopment. According to Mr. Post, the city suffers the second highest crime rate in San Diego County, and urban decay is rife throughout the city. Its population is largely transient, and its per capita income is one of the lowest in the county. Because of low property values in its residential area, the city is heavily reliant on its commercial tax base for revenue, and there

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from public streets, parks, schools, churches or residentially zoned property."

The parties stipulated that Chuck's Bookstore is an "adult entertainment establishment" within the meaning of the municipal code.

was testimony that the area zoned for commercial use is proportionately larger than in other cities.

Moreover, there was testimony that the neighborhood surrounding Chuck's Bookstore has experienced deleterious effects as a result of respondents' current location.[4] These problems were widely publicized in a series of articles appearing in the local newspaper, the Star News.

The city employs "strip zoning," or commercial zoning on either side of heavily trafficked arterials; thus its commercial zones are generally in close proximity to residential areas. As a result, only 4.5 of the 572 commercially zoned acres not already developed into a shopping mall lie beyond the distance requirements of the ordinance. This parcel of land is located in the southern portion of the city, fronting on National City Boulevard.

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[4] Following the opening of respondents' business at its current location, one neighbor, Ms. Janice Martinelli, observed men urinating in her backyard. Her nine-year-old son found used condoms and pornographic reading material in her yard, and was once chased by one of respondents' customers. Ms. Martinelli no longer allows him to play in the backyard. Prior to June of 1988, when lockable doors on the respondents' viewing booths were removed, one Star News reporter, Mr. Dane David Schiller, testified that he observed a patron placing his penis in a "glory hole" in a viewing booth, and on numerous occasions observed puddles of semen on the floor of the booths. Mr. Rich Chriss, circulation manager and part-time reporter for the Star News, testified that also prior to the removal of the lockable doors, on four or five occasions he observed male patrons placing their penises in the "glory holes." Mr. Chriss further testified that he observed acts of oral and anal sex in the booths, and anal sex in the alley behind respondents' business.

There was evidence that it currently contains a 9,000-square-foot building and a motorcycle shop.

To allow for a greater number of alternative sites for adult businesses, while still attempting to minimize their negative impact, the ordinance also provides that adult businesses are not subject to the distance requirements, and may locate anywhere within the city's 572 acres of commercially zoned property, if they are located in a retail shopping center. Under this exception, either the frontage of the business must be oriented to an enclosed mall or the business must be in a mall isolated from direct view from public streets, parks, schools, churches, and residentially zoned property.

Three existing shopping centers were identified as fulfilling the enclosed mall requirements: the Plaza Bonita Shopping Center, South Bay Plaza, and Sweetwater Town and Country. While vacancies existed at all three of these malls, not all portions of South Bay Plaza or Sweetwater Town and Country conformed to the specifications of the ordinance. It was estimated that only 5,000 to 6,000 square feet of space at Sweetwater Town and Country, and 12,000 square feet of space at South Bay Plaza, met the ordinance's criteria. Moreover, the evidence indicated that two leasing agents of certain developed property had said in response to respondents' expert witness's anonymous telephone inquiry that they would not generally rent to adult businesses.

In addition, new shopping centers may be built or existing malls may be modified in conformance with the ordinance to accommodate adult businesses. Although there was testimony as to the cost and expertise required

for such construction, no direct evidence was presented regarding the economic viability of such an enterprise, or the ability of respondents to undertake such development.

Finally, there was evidence that there is currently a trend toward developing small retail shopping centers in Southern California, and that it is relatively easy to undertake this type of development in the city. Mr. Post testified that "developing a church would actually be more difficult than developing an adult entertainment enterprise in National City."

After a three-day trial, the superior court found that the ordinance was a reasonable time, place, and manner regulation designed to serve a substantial government interest. The court also found that the ordinance provided reasonable alternative avenues of communication, noting that "there are shopping centers in existence in [National City] which could accommodate [respondents'] business and comply with the [o]rdinance," and that the city had "demonstrated that an abundant amount of land exists for development of commercial edifices which would conform to the [ordinance] requirements."[5] The court further found that the operation of Chuck's Bookstore at its

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[5] We note that the trial court's statement of decision characterizes the 572 acres of commercially zoned property as "vacant." Moreover, the Court of Appeal stated in its opinion that the "evidence [was] undisputed that under the ordinance a new or relocating adult entertainment business would be limited to locating" in certain locations, including "572 acres of undeveloped commercial land . . . " However, our review of the record reveals uncontroverted evidence that the commercially zoned property was substantially developed. Since neither party has objected to, or appeared misled by, the lower courts' mistaken characterizations of

present location was in violation of the ordinance. On that basis, the court granted the city's request for a declaration that Chuck's Bookstore constituted a public nuisance, and permanently enjoined respondents from establishing, maintaining, and operating an adult business, including an adult bookstore, at 929 National City Boulevard.

The Court of Appeal reversed. While the court found that the ordinance was constitutional on its face, and served a substantial government interest, it concluded that the ordinance as applied failed to provide reasonable alternative avenues of communication under *Renton, supra*, 475 U.S. 41, 106 S.Ct. 925. Specifically, the court found that the distance regulations allowed too few alternative sites for adult businesses, and that the "purported" opportunity to locate in enclosed malls was "illusive." This finding of illusiveness derived from both "the apparent aversion shopping mall landlords have toward the presence of adult entertainment shops on the premises," and the court's determination that construction of a new shopping facility "would not be economically feasible for the typical adult business entrepreneur." The court also took into consideration counsel's representation at oral argument that the city "has a population of over 57,000 and has only one adult entertainment business in operation." The court stated that while "not controlling, this factor does indicate that as a practical matter the ordinance is highly restrictive." Accordingly, the court held that the city "has not shown there are practical

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the property, and we conclude there are reasonable alternative avenues of communication, the discrepancy is of no significance.

alternative locations for adult entertainment establishments, and thus ordinance 18.69.030 is an impermissible restriction on protected speech."

II. DISCUSSION

A. BACKGROUND

We are guided in our analysis by two landmark decisions of the United States Supreme Court in *Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (*Young*) and *Renton, supra,* 475 U.S. 41, 106 S.Ct. 925. While the Court of Appeal cited *Young* and *Renton,* it failed to apply their express language or heed their underlying rationale.

In *Young,* the Supreme Court upheld two Detroit zoning ordinances that differentiated "between motion picture theaters which exhibit[ed] sexually explicit 'adult' movies and those which d[id] not." (427 U.S. at p. 52, 96 S.Ct. at p. 2443.) "The principal question presented by th[e] case [was] whether that statutory classification [was] unconstitutional because it [was] based on the content of communication protected by the First Amendment." (*Ibid.*) As the court later explained in *Renton,* "although five Members of the Court did not agree on a single rationale for the decision [in *Young*], we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments." (*Renton, supra,* 475 U.S. at p. 46, 106 S.Ct. at p. 928.)

Significantly, Justice Powell, in his concurring opinion in *Young*, observed, "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation." (427 U.S. at p. 78, 96 S.Ct. at p. 2455.)

In *Renton, supra*, 475 U.S. at pages 43-44, 106 S.Ct. at pages 926-927, "Renton, a city of approximately 32,000 people," sought to zone adult motion picture theaters by providing that they could not be located "within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." This distance requirement resulted in a concentration of approved locations for adult theaters. (*Id.* at p. 52, 106 S.Ct. at p. 931.) "The ordinance by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life . . . ' " (*Id.* at p. 48, 106 S.Ct. at p. 929.) There was no evidence that "at the time the Renton ordinance was enacted, any other adult business [other than Playtime Theatres] was located in, or was contemplating moving into, Renton." (*Id.* at p. 52, 106 S.Ct. at p. 931.)

The court first found that the ordinance was "properly analyzed as a form of time, place, and manner regulation" since the ordinance did not ban adult theaters altogether, but merely provided that such businesses could only be located in certain areas. (*Renton, supra*, 475 U.S. at p. 46, 106 S.Ct. at p. 928.) The court also found that

the ordinance was content-neutral, since it was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." (*Renton, supra,* 475 U.S. at p. 47, 106 S.Ct. at p. 929.)

Relying substantially on its earlier decision in *Young, supra,* 427 U.S. 50, 96 S.Ct. 2440, the high court then upheld the content-neutral time, place, and manner regulation against a First Amendment challenge, and established a two-part test: (1) whether the ordinance is designed to serve a substantial government interest, and (2) whether the ordinance allows for reasonable alternative avenues of communication. (*Renton, supra,* at p. 50, 106 S.Ct. at p. 930.) In addition, the Supreme Court noted that while the First Amendment protects sexually explicit communication, " '[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ' " (*Id.* at p. 49, fn. 2, 106 S.Ct. at p. 929, fn. 2, quoting *Young, supra,* 427 U.S. at p. 70, 96 S.Ct. at p. 2452.)

In applying its test to the Renton ordinance, the court found that the first factor was easily satisfied. The court noted that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " (*Renton, supra,* 475 U.S. at p. 50, 106 S.Ct. at p. 930, quoting *Young, supra,* 427 U.S. at p. 71, 96 S.Ct. at p. 2452.)

The court also found "no constitutional defect in the method chosen by Renton to further its substantial interests." (*Renton, supra,* 475 U.S. at p. 52, 106 S.Ct. at p. 931.)

"Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton." (*Ibid.*) " 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' " (*Ibid.*, quoting *Young, supra*, 427 U.S. at p. 71, 96 S.Ct. at p. 2452.) In this connection, the court noted that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . . " (*Renton, supra*, 475 U.S. at p. 52, 106 S.Ct. at p. 931; see *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.* (1991) ___ U.S. ___, ___, fn. **, 112 S.Ct. 501, 511, fn. **, 116 L.Ed.2d 476 ["[U]nder *Ward* and *Renton* . . . regulations must be 'narrowly tailored' to advance the interest asserted by the State."]; *People v. Superior Court (Lucero)* (1989) 49 Cal.3d 14, 27, 259 Cal.Rptr. 740, 774 P.2d 769 [Ordinance must be "content-neutral and narrowly tailored to minimize only the adverse secondary effects related to adult entertainment establishments."].)

More recently, in *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (*Ward*), the high court has provided further guidance on the "narrowly tailored" requirement. In *Ward*, the court stated that " . . . a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so." (*Id.* at p. 798, 109 S.Ct. at p. 2757.) "Rather, the requirement of narrow tailoring is

satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " (*Id.* at p. 799, 109 S.Ct. at p. 2758, quoting *United States v. Albertini* (1985) 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536). The court noted that "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." (*Ward, supra,* 491 U.S. at p. 799, 109 S.Ct. at p. 2758.) However, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." (*Id.* at p. 800, 109 S.Ct. at p. 2758.) "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct." (*Id.* at p. 801, 109 S.Ct. at p. 2759.)

In explicating the second factor, that the ordinance must allow for reasonable alternative avenues of communication, the *Renton* court rejected an economic viability standard for determining whether the zoning ordinance was constitutional. Playtime Theatres claimed that the ordinance was invalid in part because as a practical matter it restricted the availability of locations for adult businesses. Under the *Renton* ordinance, "520 acres, or more than five percent of the entire land area of Renton, [was] open to use as adult theater sites." (*Renton, supra,* 475 U.S. at p. 53, 106 S.Ct. at p. 932.) "The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consist[ed] of '[a]mple, accessible real estate,' including 'acreage in all stages of

development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.' " (*Ibid.*)

Playtime Theatres contended, however, that "some of the land in question [was] already occupied by existing businesses, that 'practically none' of the undeveloped land [was] currently for sale or lease, and that in general there [were] no 'commercially viable' adult theater sites within the 520 acres left open by the Renton ordinance." (*Renton, supra,* 475 U.S. at p. 53, 106 S.Ct. at p. 932.) Specifically, "[a] substantial part of the 520 acres [was] occupied by: ¶ (1) a sewage disposal site and treatment plant; ¶ (2) a horseracing track and environs; ¶ (3) a business park containing buildings suitable only for industrial use; ¶ (4) a warehouse and manufacturing facilities; ¶ (5) a Mobil Oil tank farm; and, ¶ (6) a fully-developed shopping center." (*Playtime Theaters, Inc. v. City of Renton* (9th Cir.1984) 748 F.2d 527, 534.) The Ninth Circuit "accepted these arguments, concluded that the 520 acres was not truly 'available' land, and therefore held that the Renton ordinance 'would result in a substantial restriction' on speech." (*Renton, supra,* 475 U.S. at pp. 53-54, fn. omitted, 106 S.Ct. at p. 932.)

The Supreme Court held unequivocally to the contrary: "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' . . . we have never suggested that the First Amendment compels the Government to

ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. . . . 'The inquiry for First Amendment purposes is not concerned with economic impact.' . . . In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." (*Renton, supra,* 475 U.S. at p. 54, 106 S.Ct. at p. 932, quoting *Young, supra,* 427 U.S. at p. 78, 96 S.Ct. at p. 2456.)

Thus, the court held that "the Renton ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult theaters." (*Renton, supra,* 475 U.S. at p. 54, 106 S.Ct. at p. 932, quoting *Young, supra,* 427 U.S. at p. 71, 96 S.Ct. at p. 2452.) "Renton has not used 'the power to zone as a pretext for suppressing expression,' . . . but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning." (*Ibid.*) "Here, as in [*Young*], the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment." (*Id.* 475 U.S. at pp. 54-55, 106 S.Ct. at p. 932.)

B. APPLICATION OF THE RENTON ANALYSIS

In applying the *Renton* analysis to the ordinance here, we determine as a preliminary matter whether the ordinance is a content-neutral time, place, and manner

regulation. If so, we then determine whether the ordinance, and in particular the shopping center exception, is designed to serve a substantial governmental interest, and allows for reasonable alternative avenues of communication.[6]

1. *Content-Neutrality*

Since the National City ordinance, like the one in *Renton*, does not ban adult businesses altogether, but merely provides that such businesses may only be located in certain areas, the ordinance is properly analyzed as a form of time, place, and manner regulation. (*Renton, supra*, 475 U.S. at p. 46, 106 S.Ct. at p. 928.)

Moreover, we conclude that the ordinance is content-neutral, since the ordinance is, as in *Renton, supra*, 475 U.S. at p. 47, 106 S.Ct. at p. 928, aimed not at the content of materials sold, but rather at the secondary effects of

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[6] Respondents attempt to raise in this court several arguments under the California Constitution. Respondents failed to raise these arguments in the Court of Appeal. Accordingly, we do not reach these claims, or decide whether the California Constitution provides greater protection to respondents than the federal Constitution. (Cal.Rules of Court, rule 29.)

In addition, respondents raise in this court arguments regarding a conditional use permit amendment to the ordinance. Once again, however, respondents failed to raise these arguments in the Court of Appeal, and we therefore decline to consider them here. Moreover, we note that respondents appear to largely rely on the amendment as further evidence of an alleged impermissible government intent, an argument we consider *post* and reject.

adult businesses on the surrounding community.[7] While the superior court did not expressly address this issue, in its discussion of the evidence in support of its finding that the ordinance was designed to serve a substantial government interest, the court noted that there was testimony that the ordinance "was enacted as part of a comprehensive scheme of urban redevelopment" in an effort to combat blight in National City, and that "the presence of Chuck's Bookstore . . . has led to 'secondary effects' on the community . . . " Moreover, the court's ruling upholding the constitutionality of the ordinance under *Renton* constitutes an implied finding that the ordinance is content-neutral. The record amply supports this implied finding.

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[7] We note that the written stated purpose of the ordinance is to "prevent problems of blight and deterioration which accompany and are brought about by the concentration of adult entertainment establishments." However, there was also evidence that under the shopping center exception, adult businesses could be concentrated so long as they were located in a mall. Hence, it appears that the written stated purpose of the ordinance has not been amended to conform with the addition of the shopping center exception, and the purpose underlying that exception. However, we note that respondents have never contended, and in particular did not contend at the trial level, that the written stated purpose of the ordinance failed to support the city's testimony as to the purpose of the shopping center exception, despite the fact that the issue was brought to the parties' attention by the trial judge. Hence, we conclude that both purposes of the ordinance are supported by substantial evidence, and that we may rely on both purposes in determining that the ordinance is content-neutral.

Respondents devote much of their argument to the proposition that the city's ordinance is content-based, and that the "predominant censorial purpose" behind it was to prohibit the establishment of any adult business. In support of this contention, respondents rely on evidence they claim establishes that the city knew or should have known owners of shopping centers would be either reluctant, or would outright refuse, to rent to an adult business. The factual predicate for this argument is unsupported by the record, since Mr. Post categorically denied that city planners were aware of any reluctance to rent.[8] More importantly, Mr. Post denied any motivation on the part of the city to eliminate adult businesses. Rather, Mr. Post testified that the purpose of the ordinance was to alleviate the secondary effects of adult businesses, while allowing reasonable alternative locations for those businesses. The trial court apparently credited this testimony, and we see no reasons to question its ruling. (See *Renton, supra,* 475 U.S. at p. 48, 106 S.Ct. at p. 929, quoting *United States v. O'Brien* (1968) 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 [" 'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.' "];

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[8] Rather, respondents' evidence in this regard essentially consists of testimony that it is generally known among realtors that shopping centers do not usually rent to adult businesses. Such generalized, speculative evidence, not linked to any city representative, fails to even rise to the level of an illicit "motivating factor." (See *Renton, supra,* 475 U.S. at pp. 47-48, 106 S.Ct. at pp. 928-929 [distinguishing generally between an illicit "motivating factor" and a legitimate "predominant purpose"].)

Ward, supra, 491 U.S. at p. 791, 109 S.Ct. at p. 2753, quoting *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 ["Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' "].)

Respondents also rely on evidence that they claim demonstrates that the city knew or should have known that it would not be economically feasible for an adult business to build its own shopping center. However, as we discuss more fully in our evaluation of whether the ordinance allows for reasonable alternative avenues of communication, the ordinance does not limit respondents' alternatives to such construction.

Finally, respondents argue that since the effect of the ordinance is to eliminate all adult businesses, that must be its underlying intent. Since we conclude, *post,* that the ordinance does not have this effect, we likewise reject respondents' suggestion of illicit intent.

In sum, we conclude that the ordinance is content-neutral, and proceed to evaluate the constitutionality of the ordinance under *Renton's* two-part test.

2. *Substantial Government Interest*

We find, as did the two lower courts, that the first prong of "substantial governmental interest" is easily satisfied. The city presented substantial evidence at trail that adult businesses are a source of urban decay, and that the location of the adult business at issue in this case has in fact led to the secondary effects the ordinance

seeks to curtail. Moreover, the city demonstrated that both the distance regulation and the shopping center exception are designed to serve substantial government interests in decreasing blight and crime, shifting part of the regulatory burden to the private sector, by either dispersing adult businesses, or by placing them in locations such as enclosed shopping malls designed to minimize the occurrence of negative secondary effects, and protecting the city's tax base. (See *Renton, supra,* 475 U.S. at p. 48, 106 S.Ct. at p. 929 [upholding ordinance "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life' "].) We also find that the city's shopping mall exception is narrowly tailored, since the " 'regulation promotes . . . substantial government interest[s] that would be achieved less effectively absent the regulation.' " (*Ward, supra,* 491 U.S. at p. 799, 109 S.Ct. at p. 2758, quoting *United States v. Albertini, supra,* 472 U.S. at p. 689, 105 S.Ct. at p. 2906.)

First, under the ordinance, the malls in which adult businesses are permitted to be established are either inward looking configurations, or those "isolated from direct view from public streets, parks, schools, churches or residentially zoned property." Access is by a pedestrian walkway, not a public street. This configuration reduces the secondary effects associated with adult businesses by segregating such businesses away from residential areas and schools, and placing them in a location where they do not affect the moral climate of the community as a whole. Specifically, it decreases the problems of

harassment of neighborhood adults and children, littering of sexually explicit reading material and paraphernalia, loitering, and visual blight from bright colors and explicit signage associated with adult businesses.

Second, placing adult businesses in shopping centers promotes the city's interests by shifting part of the regulatory burden to the private sector. A shopping center has its own signage, paint, and landscaping restrictions. A mall arrangement also addresses such factors as hours of operation, parking, and security. Thus, a shopping center generally exercises a high degree of control over its tenants. This benefits the city, as Mr. Post testified, by removing it from "the enforcement business. We don't have to expend the amount of resources that we typically would if the shopping center itself is doing some of the policing in terms of these various factors."[9]

Finally, there was testimony that the result of reducing the secondary effects of adult businesses, and freeing up public protection resources, is a healthier economic base. As noted above, National City is particularly reliant on its commercial tax base, and hence has a substantial interest in its preservation.

Therefore, placing adult businesses in malls furthers the city's substantial interests in reducing the secondary

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[9] Moreover, there was testimony that adult businesses are considered "destination retail," i.e., they deal in goods that consumers specifically seek out wherever they are located, and that this characteristic lends them to placement within a structure that is not exposed directly to the street. "Destination retail" businesses are such that if they do relocate, their clientele will typically follow.

effects of adult businesses, relieving the city from some of the regulatory burden by shifting it to the private sector, and protecting the commercial tax base.

3. *Reasonable Alternate Avenues of Communication*

We also conclude that the ordinance provides reasonable alternative avenues of communication. The ordinance makes available the entire commercially zoned area of the city, or 572 acres of land, on which to locate an adult business. This area is highly accessible by major freeways and arterials. In addition, the ordinance limits neither the total number of adult businesses that may locate in the city, nor the hours they may operate. Finally, the ordinance does " 'not affect the operation of existing establishments but only the location of new ones.' " (*Young, supra,* 427 U.S. at p. 71, fn. 35, 96 S.Ct. at p. 2453, fn. 35, citation omitted.)

Respondents contend, however, that the availability of sites under the ordinance is "illusory" because of the lack of sites currently for rent, the unwillingness of owners of available sites to rent to them, and the considerable cost of building their own shopping center in compliance with the ordinance. We find none of these arguments establish constitutional infirmity.

The high court in *Renton* made clear that " 'The inquiry for First Amendment purposes is not concerned with economic impact.' " (*Renton, supra,* 475 U.S. at p. 54, 106 S.Ct. at p. 932, quoting *Young, supra,* 427 U.S. at p. 78, 96 S.Ct. at p. 2456. See *City of Vallejo v. Adult Books* (1985)

167 Cal.App.3d 1169, 1180, 213 Cal.Rptr. 143) ["[E]vidence of the considerable economic difficulty of locating 'adult' uses at many legally permissible sites within the City of Vallejo. . . . falls far short of establishing that appellant is foreclosed or unreasonably restricted by the ordinance from effectively operating within the city limits."], cert. den. (1986) 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 601. As noted earlier, *Renton* refused to sustain an economic viability argument on a record demonstrating that a substantial part of the 520 acres zoned for adult businesses was occupied by a sewage disposal site, race track, and other uses restricting, as a practical matter, available sites. Similarly, we decline to find on this record that National City's ordinance fails to provide reasonable alternative avenues of communication.[10]

Moreover, *Renton* explicitly rejected the argument that because " 'practically none' of the undeveloped land [was] currently for sale or lease" the ordinance " 'would result in a substantial restriction' on speech." (*Renton, supra,* 475 U.S. at pp. 53-54, 106 S.Ct. at p. 932, citations omitted.) The record here in fact reveals that vacancies existed at all three shopping centers, and that the evidence of landowners' unwillingness to rent consisted essentially of generalized responses by two leasing agents to respondents' expert's anonymous telephone inquiry, and testimony that it is generally known among

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[10] Respondents assert that if we uphold this ordinance, we approve in advance any and all economic restrictions on adult businesses in violation of *Renton*. While it is conceivable that a zoning ordinance could mandate economic restrictions so severe as to amount to an outright prohibition of First Amendment speech, that is not the case here.

realtors that shopping centers do not usually rent to adult businesses. Nor, in this case, is any reluctance or outright refusal of private land owners to rent to adult businesses dispositive of the issue of whether the ordinance provides a reasonable opportunity for such businesses to locate within National City. While a city may not suppress protected speech, neither is it compelled to act as a broker or leasing agent for those engaged in the sale of it. We decline to hold local governments responsible for the business decisions of private individuals who act for their own economic concerns without any reference to the First Amendment. The Constitution does not saddle municipalities with the task of ensuring either the popularity or economic success of adult businesses.

Respondents' reliance on the fact that only one other adult business currently operates within the city is also misplaced. The number of adult businesses is, without more, of no particular significance in evaluating the validity of the ordinance. We find no authority that mandates a constitutional ratio of adult businesses to a particular population figure.[11] We note that at the time

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[11] We also reject the analysis suggested by the City of San Diego, and the 36 cities joining in its amicus curiae brief, that we look to the availability of adult materials in surrounding communities in determining whether the National City ordinance provides reasonable alternative avenues of communication. In general, " '[o]ne is not to have the exercise of his [or her] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " (*Schad v. Borough of Mount Ephraim* (1981) 452 U.S. 61, 76-77, 101 S.Ct. 2176, 2187, 68 L.Ed.2d 671, quoting *Schneider v. State* (1939) 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155.) Moreover, respondents have filed a motion to strike the factual material filed in support of

the *Renton* ordinance was enacted "no adult theaters were located in Renton. . . . " (*Playtime Theaters, Inc. v. City of Renton, supra,* 748 F.2d at p. 530.) Moreover, nothing in this record indicates whether similar enterprises have attempted to locate in the city and have been thwarted by virtue of unreasonable restrictions, or simply found it economically less advantageous than other localities.

It is also inaccurate to characterize the ordinance as forcing respondents to build their own shopping mall at prohibitive cost. Rather, this is merely one option under the ordinance. The city has demonstrated that there are three shopping centers, and a developed 4.5-acre area, where an adult business may seek to rent an existing location. Moreover, certain malls may be modified in conformance with the ordinance to accommodate adult businesses. It is respondents, not the city, who define construction of a new shopping center as their only alternative under the ordinance. Hence, we conclude that the ordinance provides reasonable alternative avenues of communication.

San Diego's argument, as well as certain factual material attached to the Western Center for Law and Religious Freedom, et al.'s, amicus curiae brief. We share respondents' concern that none of this material was introduced below, and hence has not been subjected to the rigors of the adversarial process. Accordingly, we have not considered this material in reaching our decision. (See *Bily v. Arthur Young & Company* (1992) 3 Cal.4th 370, 405, fn. 14, 11 Cal.Rptr.2d 51, 834 P.2d 745 [court may choose to ignore improper material filed in appellate brief rather than strike it from the file].)

CONCLUSION

We hold that National City's ordinance is constitutional under the First Amendment. Accordingly, the judgment of the Court of Appeal is reversed, and the matter remanded with instructions to reinstate the trial court's judgment.

LUCAS, C.J., and PANELLI, BAXTER, and GEORGE, JJ., concur.

BAXTER, Justice, concurring.

I concur fully in the reasoning and judgment of the majority. I do so because the evidence does not support a conclusion that no bookstore handling "adult" materials would be able to rent space in National City. No evidence was offered that would support a conclusion that a bookstore which is clean, is well maintained and supervised, and which expects both staff and customers to abide by the law and socially acceptable norms of public conduct would be unable to rent space in a mall in National City.

While I also agree with Justice Mosk that the evidence in this case would support a judgment that Chuck's Bookstore was a common law public nuisance, the trial court did not make such a finding. In its statement of decision, the court expressly noted that the decision would focus on the city's claim that defendant's operation violated the municipal code. This confirms that the trial court judgment rested solely on the theory of statutory public nuisance. This court may not affirm the judgment on a theory that a common law public nuisance was established. The rule which requires that a reviewing court sustain a judgment if the result is correct even if the

trial court based its decision on an erroneous legal theory, has no application here.

International etc. Workers v. Landowitz (1942) 20 Cal.2d 418, 126 P.2d 609, on which Justice Mosk relies, was an action in which plaintiffs sought an injunction against future violations of a local ordinance. The trial court sustained a demurrer on the ground that the statute was constitutionally invalid. This court disagreed but nonetheless affirmed the judgment of dismissal because subsequent to the entry of judgment the enabling legislation which authorized adoption of the local ordinance had been repealed. There being no other basis for the action, we applied the rule of *Sewell v. Johnson* (1913) 165 Cal. 762, 769, 134 P. 704: "[W]here matters of which the court has judicial knowledge occur subsequent to the trial court's action and have the effect of destroying the basis for the plaintiff's cause of action, it has been held that the appellate court may dispose of the case upon those grounds." (*International etc. Workers v. Landowitz, supra,* 20 Cal.2d at p. 423, 126 P.2d 609.)

The rule that an appellate court will affirm a correct judgment even if the trial court's reasoning was faulty was adopted by this court in *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329-330, 48 P. 117: "The fact that the action of the [trial] court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right

upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. [¶] . . . [¶] In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter."

This rule may not be used to uphold a judgment granting relief on the basis of only one of two or more counts pleaded in the complaint, each of which counts asserts a different basis for relief.

"Exceptions exist to the rule of nonreviewability of a trial court's reasons for its decision. The exception . . . most germane to this appeal allows for reversal where the trial court has refused to pass on an issue and disposes of the case on an entirely different ground. If the trial court thus chose an improper ground, an appellate court will not uphold the judgment on the ground *not* addressed by the trial court, *if* resolution of that issue depends upon conflicting evidence." (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933, fn. 9, 266 Cal.Rptr. 231, italics in original. See also, *Zak v. State Farm etc.. Ins. Co.* (1965) 232 Cal.App.2d 500, 506, 42 Cal.Rptr. 908; *Kyne v. Kyne* (1943) 60 Cal.App.2d 326, 332, 140 P.2d 886; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 262, p. 269.)

The trial court in this case did make factual findings that might also support a conclusion that Chuck's Bookstore was a common law public nuisance. It did so only insofar as that evidence was relevant to determining that the bookstore had undesirable "secondary" effects,

however. The [sic] court did not make the findings necessary to resolve whether Chuck's Bookstore was, at the time the action was brought, a common law public nuisance.[1] It would not be appropriate, therefore, to uphold the judgment on the basis suggested by Justice Mosk.

MOSK, Justice, concurring and dissenting.

There are nine words in the majority opinion with which I agree: "the judgment of the Court of Appeal is reversed." However, because the bulk of the opinion proposes to give effect to a city ordinance that unconstitutionally bans the dissemination of First Amendment-protected material, I must distance myself from its reasoning.

First, the facts.

At the time of trial, Chuck's Bookstore was the only adult bookstore in National City – a city of more than

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[1] Two of the three witnesses who testified regarding the activities and conditions described in footnote 4 of the majority opinion, *ante*, made their observations a year or more prior to trial. Both acknowledged that prior to trial changes had been made in the interior of the bookstore. Subsequent to their observations a fence had been constructed to separate the rear alleyway from the rear yard of the home directly behind the bookstore. Therefore, although their testimony was uncontradicted, it was not adequate to establish that either the bookstore employees or the patrons currently engaged in the objectionable conduct. The third witness, who lived behind the bookstore, testified that she continued to be bothered by patrons even after the fence was constructed and that her neighbors were also bothered. Her testimony did not establish a common law nuisance as a matter of law, however.

57,000 – although there is one other sexually oriented business, a movie theater.

Purporting to rid itself of urban blight, the city enacted an ordinance prohibiting sexually oriented businesses like Chuck's from locating within 1,500 feet of each other, 1,500 feet of a school or park, or 1,000 feet of a residential zone. Strip development dominates the city's commercial zones; therefore, as the city conceded at trial, the distance rules are an effective ban on places like Chuck's. But the law also provides that Chuck's may operate in any commercial zone, regardless of the aforementioned distance requirements, as long as it is in an enclosed mall or an unenclosed mall in which it faces inward so as to be invisible from the street.

The city sought abatement of Chuck's as a common law and statutory public nuisance. The common law claim rested on an allegation that Chuck's was pestiferous to its neighbors. The basis for the statutory claim was that Chuck's violated a National City ordinance: it was too close to residences and the adult theater, and it did not come within any exception to the distance rules because it was not in an enclosed or inward-facing mall.

It was uncontested that Chuck's enjoys First Amendment protection and therefore the city must provide reasonable alternative avenues of communication, as constitutionally required.[1] But much of the city's case

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[1] The First Amendment does not prevent the state from suppressing obscenity (*Roth v. United States* (1957) 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498), but there was no

focused on its allegation that Chuck's was a common law public nuisance. It is to this theory that I turn first.

I

The city could properly seek to have the bookstore abated as a common law public nuisance. (Civ.Code, § 3491, subd. 3; Code Civ.Proc., § 731.) The city alleged, and provided strong evidence at trial, that Chuck's is a classic public nuisance. (Civ.Code, §§ 3479, 3480.) The store had front and rear entrances. The management would leave the rear door open, evidently without proper supervision, and patrons would wander between Chuck's and the back alley, which ineffectually separated the store from a historically distinguished row of residences. Chuck's patrons would, among other activities, have sex in the bushes, wander into neighboring residents' backyards, bother the neighbors with unsavory requests, and discard condoms and pornographic material on or near neighbors' residential property. Store workers would slop buckets of pungent cleaning fluid into the back alley.[2]

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contention in this case that Chuck's was selling obscene material.

[2] Also see the portion of footnote 4 of the majority opinion describing neighbors' injuries. It is important to note, however, that the references in that footnote to indoor conduct, distasteful as that conduct might be to most people, do not describe a nuisance, for the actionable injury presumably would be neither to others on their own property nor to the possessor of the indoor premises. (See *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1133-1137, 281 Cal.Rptr. 827.)

The common law of nuisance has been codified in our Civil Code. Thus it has a statutory basis. Nevertheless, I shall

The record leaves no doubt whatever that defendant did not manage the property properly.

Thus there was ample evidence to sustain the trial court's judgment that the bookstore was a public nuisance. The judgment did not specify, however, whether Chuck's was a statutory or a common law nuisance, and the statement of decision discussed only the statutory claim. Perhaps for this reason, the Court of Appeal focused on the constitutionally infirm statutory claim, rather than the strong evidence that Chuck's was a common law public nuisance.[3]

Assuming arguendo that the trial court's judgment declaring Chuck's a public nuisance was rendered on the constitutionally infirm statutory ground, rather than on the sound basis of the Civil Code, nevertheless the trial court's decision was correct because there was sufficient evidence of a common law public nuisance to support it. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925, 101

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continue to refer to the first cause of action as one for common law nuisance, to distinguish it from the second cause of action under the National City ordinance, which is also statutory.

[3] The bookstore's First Amendment-protected status does not shield it from California's common law public nuisance laws. (*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 707, 106 S.Ct. 3172, 3177, 92 L.Ed.2d 568 [plur. opn.]; accord *id.* at p. 708, 106 S.Ct. at p. 3178 [conc. opn. of O'Connor, J.]; see also *Grayned v. City of Rockford* (1972) 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222; *cf. People ex rel. Arcara v. Cloud Books, Inc.* (1986) 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 [closing bookstore as nuisance impermissibly burdened freedom of expression under New York Constitution if lesser sanctions would end nuisance]; but see fn. 12, *post*.)

Cal.Rptr. 568, 496 P.2d 480.) The judgment should therefore have been sustained, for a reviewing court must sustain a judgment if the result was correct, no matter that the trial court gave the wrong legal reason for its decision. (*International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, 423, 126 P.2d 609 [even if court erred in its analysis of ordinance's constitutionality, judgment must be sustained because it was correct on other grounds].) Therefore the majority opinion is correct that the Court of Appeal's judgment must be reversed.

Alas, in their eagerness to comment on the constitutionality of the ordinance – in actuality not at issue – the majority ignore the common law nuisance claim. Thus in my view their discussion becomes purely advisory.

It is axiomatic that we may not address constitutional questions when there is another ground on which to reach a decision. Such is the rule we have previously imposed on ourselves. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 233, 149 Cal.Rptr. 239, 583 P.2d 1281 [stating general rule]; *People v. Williams* (1976) 16 Cal.3d 663, 667, 128 Cal.Rptr. 888, 547 P.2d 1000.) It is also part of the self-discipline of the United States Supreme Court, which calls it a " 'fundamental rule of judicial restraint.' " (*Jean v. Nelson* (1985) 472 U.S. 846, 854, 105 S.Ct. 2992, 2997, 86 L.Ed.2d 664.) The federal high court has commanded all federal courts to follow the rule. (*Ibid.*) And it is a principle of decision-making to which the appellate courts of every other state

in the United States subscribe.[4] Finally, a restrained view of a reviewing court's role would ascribe no importance

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[4] (*Love v. Fulford* (Ala. 1983) 442 So.2d 29, 33; *Perry v. State* (Alaska 1967) 429 P.2d 249, 252; *State v. Church* (1973) 109 Ariz. 39, 504 P.2d 940, 942 [usual rule]; *Bell v. Bell* (1971) 249 Ark. 959, 462 S.W.2d 837, 840; *Lipset v. Davis* (1949) 119 Colo. 335, 203 P.2d 730, 731; *City of Hartford v. Powers* (1981) 183 Conn. 76, 438 A.2d 824, 828; *Agostini v. Colonial Trust Co.*, (1945) 28 Del.Ch. 360, 44 A.2d 21, 22, fn. 1; *State v. Tsavaris* (Fla.1981) 394 So.2d 418, 421-422; *Farmer v. State* (1971) 228 Ga. 225, 184 S.E.2d 647, 648; *Doe v. Roe* (1984) 67 Haw. 63, 677 P.2d 468, 471; *Posy v. Bunney* (1977) 98 Idaho 258, 561 P.2d 400, 406; *Haughton v. Haughton* (1979) 76 Ill.2d 439, 31 Ill.Dec. 183, 187, 394 N.E.2d 385, 389; *Board of Com'rs. v. Kokomo City Plan Com'n* (1975) 263 Ind. 282, 330 N.E.2d 92, 96; *In Interest of Chad* (Iowa 1982) 318 N.W.2d 213, 216, fn. 2; *State ex rel. Fatzer v. Barnes* (1951) 171 Kan. 491, 233 P.2d 724, 726; *Preston v. Clements* (Ct.App. 1950) 313 Ky. 479, 232 S.W.2d 85, 88; *Benson & Gold Chev. v. La. Motor Veh. Com'n* (La.1981) 403 So.2d 13, 23; *State v. Bassford* (Me.1982) 440 A.2d 1059, 1061; *Com'r of Labor and Industry v. Fitzwater* (Ct. App. 1977) 280 Md. 14, 371 A.2d 137, 140; *Com. v. Loretta* (1982) 386 Mass. 794, 438 N.E.2d 56, 59; *Snyder v. Charlotte P. School Dist., Eaton Cty.* (1984) 421 Mich. 517, 365 N.W.2d 151, 158; *Complaint Concerning Winton* (Minn.1984) 350 N.W.2d 337, 343, fn. 9; *Kron v. Van Cleave* (Miss. 1976) 339 So.2d 559, 563; *State ex rel. Union Elec. v. Pub. Serv. Com'n* (Mo. 1985) 687 S.W.2d 162, 165 & fn. 4; *Board of Com'rs of Flathead County v. Eleventh Judicial Dist. Court* (1979) 182 Mont. 463, 597 P.2d 728, 731; *State Department of Motor Vehicles v. Lessert* (1972) 188 Neb. 243, 196 N.W.2d 166, 169; *Spears v. Spears* (1979) 95 Nev. 416, 596 P.2d 210, 212; *State v. Hodgkiss* (1989) 132 N.H. 376, 565 A.2d 1059, 1061; *Donadio v. Cunningham* (1971) 58 N.J. 309, 277 A.2d 375, 384; *Property Tax Dept. v. Molycorp, Inc.* (1976) 89 N.M. 603, 555 P.2d 903, 905-906; *Peters v. New York City Housing Authority* (1954) 307 N.Y. 519, 121 N.E.2d 529, 531; *Williams v. Williams* (1980) 299 N.C. 174, 261 S.E.2d 849, 859; *Murie v. Cavalier County* (1938) 68 N.D. 242, 278 N.W. 243, 246; *Greenhills Home Own. Corp. v. Village of Greenhills* (1966) 5 Ohio St.2d 207, 215 N.E.2d 403, 407; *Schwartz v. Diehl*

to a party's desire to resolve the case on constitutional grounds or lower courts' failure to address the common law claim. (See *United States v. Locke* (1985) 471 U.S. 84, 92, 105 S.Ct. 1785, 1791, 85 L.Ed.2d 64; *United States v. C.I.O.* (1948) 335 U.S. 106, 110, 68 S.Ct. 1349, 1351, 92 L.Ed. 1849; *Troy State University v. Dickey* (5th Cir.1968) 402 F.2d 515, 516.)

The constitutional discussion is not necessary to reach the result that the Court of Appeal's judgment must be reversed. It therefore may be deemed a dictum, unnecessary to the judgment. (*Bakke v. St. Thomas Public Sch. Dist. No. 43* (N.D.1984) 359 N.W.2d 117, 120.)

II

As indicated above, the constitutional issue should be of no precedential importance. But because the majority opinion contains a gratuitous commentary on the

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(Okla. 1977) 568 P.2d 280, 283; *State v. House* (1985) 299 Or. 78, 698 P.2d 951, 952; *Ballou v. State Ethics Commission* (1981) 496 Pa. 127, 436 A.2d 186, 187 & fn. 2; *Town of Barrington v. Blake* (R.I. 1987) 532 A.2d 955; *Floyd v. Thornton* (1951) 220 S.C. 414, 68 S.E.2d 334, 339 [general rule]; *State v. Big Head* (S.D. 1985) 363 N.W.2d 556, 559; *Watts v. Memphis Transit Management Co.* (1971) 224 Tenn. 721, 462 S.W.2d 495, 498; *Courtney v. State* (Tex.Ct. App. 1982) 639 S.W.2d 16, 17; *Goodsel v. Department of Business Regulation* (Utah 1974) 523 P.2d 1230, 1232; *Watkins v. Ford* (1918) 123 Va. 268, 96 S.E. 193, 194; *State v. Clarke* (1985) 145 Vt. 547, 496 A.2d 164, 167; *Tommy P. v. Board of County Com'rs* (1982) 97 Wash.2d 385, 645 P.2d 697, 700; *Priester v. Hawkins* (1981)168 W.Va. 569, 285 S.E.2d 396, 398; *Labor & Farm Party v. Elections Bd. of Wis.* (1984) 117 Wis.2d 351, 344 N.W.2d 177, 179; *Stambaugh v. State* (Wyo.1977) 566 P.2d 993, 996.)

constitutionality of the National City ordinance, I offer my own views on the subject.

The record establishes conclusively that as applied to a sexually oriented business the National City ordinance cannot pass constitutional muster.

City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (*Renton*), the leading case in this area,[5] held that an ordinance that regulates sexually oriented but First Amendment-protected establishments must provide for alternative avenues of communication, and that these avenues must be reasonable. (*Id.* at p. 50, 106 S.Ct. at p. 930.) Moreover, the burden lies with the government to show that the reasonable alternatives exist. (*Ibid.*; see also *Playtime Theaters, Inc. v. City of Renton* (9th Cir.1984) 748 F.2d 527, 538.) Though *Renton* upheld that city's dispersal ordinance, it made clear, in line with its general statement at page 50 of 475 U.S., at page 930 of 106 S.Ct., that the First Amendment requires a city to "refrain from effectively denying . . . a *reasonable* opportunity to open and operate an adult theater within the city. . . ." (*Id.* 475 U.S. at p. 54, 106 S.Ct. at p. 932, italics added.)

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[5] The majority opinion refers both to *Renton* and to *Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 as landmark cases. But *Young* was a plurality opinion, and the high court recently disparaged it. (*R.A.V. v. City of St. Paul* (1992) 505 U.S. ___, ___, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305, 322.) Also, in diametrical contrast to this case, *Young* considered a dispersal ordinance that left many locations available. (427 U.S. at pp. 71-72, fn. 35, 96 S.Ct. at p. 2453, fn. 35.) For these reasons, I shall concentrate on *Renton* as the significant United States Supreme Court authority.

With these principles in mind, let us examine in greater detail the facts of this case as revealed at trial.

The city's planning director testified that the distance requirements, taken by themselves, imposed a de facto ban, denying any opportunity – much less a reasonable one – for Chuck's to operate in National City. Because such a ban is patently unconstitutional, the city also purported to give sexually oriented businesses the opportunity to locate in an unobtrusive mall location. But as the record reveals, the city's exception is meaningless – the opportunity it provides is purely chimerical.

The record discloses that there were only three existing locations that could fulfill the mall requirements: the Plaza Bonita, Sweetwater Town & Country, and South Bay Plaza shopping centers. A witness for defendant, Tony Solis, testified that none of the three shopping centers would lease to an adult bookstore. At South Bay Plaza the leasing agent told him that the center would not rent to a business like Chuck's. At Town & Country he found out from realtors that an existing lease to Circuit City specified either that Circuit City was forbidden to sublet to an adult bookstore or that the mall was forbidden to lease any space to such a business. At the third and final possible location, Plaza Bonita, the character of the mall was apparently sufficiently genteel that Solis did not even inquire about the possibility of entering into a lease, but merely surveyed the site and took photographs of existing businesses.

In sum, no existing site was available to Chuck's, a fact that led to the trial court's somewhat rhetorical remark to counsel. "Is there any question in your mind

that not in a million years would Plaza Bonita, or T & C, or South Bay Plaza rent to Mr. Wiener [defendant] . . . ?"[6]

The unavailability of the city's entire commercial area, including the three enclosed malls, left only the possibility of new construction that would fulfill the city's concealment requirements. In that regard, defendant's expert witness Clifford Beck – a redevelopment consultant with 40 years' [sic] construction experience in shopping centers and an expert in mall development – testified it would cost $6.5 million to build a small inward-facing mall that would meet the requirements.[7]

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[6] At times the witnesses seemed bemused or incredulous at the kinds of questions they were being asked, because the shopping centers' unwillingness to rent to an adult bookstore seemed self-evident to them. Solis testified:

"Q. In your experience in the commercial real estate business, is it expected that retail shopping centers such as the ones I've mentioned would not rent to adult entertainment businesses?

"A. That's correct. They ordinarily wouldn't rent.

"Q. Would not rent?

"A. Would not rent to an adult bookstore.

"Q. And is that generally known by people who are in the commercial real estate business?

"A. Well, if you don't know it, you'll soon find out."

[7] The majority opinion indirectly acknowledges this testimony, but then states that "no direct evidence was presented regarding the economic viability of such an enterprise, or the ability of respondents to undertake such development." (Maj. opn., *ante*, p. 705 of 12 Cal.Rptr.2d p. 227 of 838 P.2d.) This conclusion implies that the burden lies on the bookseller, not the city, to show that the ordinance does not offend the First Amendment. The law, however, is otherwise. (*Morscott, Inc. v. City of Cleveland* (N.D. Ohio 1990) 781 F.Supp. 500, 503; *World Wide Video v. City of Tukwila* (1991) 117 Wash.2d 382, 389-390, 816

More significant yet was Beck's uncontradicted testimony that in National City it would require two to five years merely to assemble the property – from thirty different landowners – and financing needed to build the most uncomplicated and minimally sized mall that would meet the city's rules.

In sum, defendant proved that the city had effectively denied him "a reasonable opportunity to open and operate an adult [business]. . . . " (*Renton, supra,* 475 U.S. at p. 54, 106 S.Ct. at p. 932.)[8] To reach any other conclusion is to ignore commercial reality as well as the First Amendment's command. "There can be no doubt that bookselling is a constitutionally protected activity or that closing a bookstore for a year may have a substantial impact on that activity." (*People ex rel. Arcara v. Cloud Books, Inc., supra,* 68 N.Y.2d 553, 558, 510 N.Y.S.2d 844, 847, 503 N.E.2d 492, 495 [interpreting New York Constitution].)

Relying on *Renton, supra,* 475 U.S. 41, 106 S.Ct. 925, the majority opinion implies that defendant's inability to locate his business anywhere in National City does not

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P.2d 18, 21; see also *Renton, supra,* 475 U.S. at p. 50, 106 S.Ct. at p. 930.)

[8] There was one other possibility for relocation: the addition, to an existing strip mall of the type ubiquitous in southern California, of an inward facing adult bookstore. Ironically, the city established through defendant's witness Beck that this too was impossible: the loss of parking space would make the entire mall uneconomical and might violate zoning laws, and the existing tenants would "beef like mad" about the obstruction of their all-important exposure to the street. In sum, such a modification would not be feasible.

violate the First Amendment because the only impediments to doing so are economic. (Maj. Opn., *ante*, p. 712 of 12 Cal.Rptr.2d, p. 234 of 838 P.2d ["The Constitution does not saddle municipalities with the task of ensuring either the popularity or economic success of adult businesses."].) That statement betrays a fundamental misunderstanding of *Renton's* teaching.

The Ninth Circuit explained that the Renton ordinance set aside 520 acres of which an adult bookstore could be located, but noted that the district court had found that "a substantial part" of the 520 acres was occupied by existing businesses or industrial facilities not easily adapted – if adaptable at all – to an adult bookstore. (*Playtime Theaters, Inc. v. City of Renton, supra*, 748 F.2d 527, 534.) The high court rejected the Ninth Circuit's view that these impediments amounted to a substantial restriction on speech. The court stated: "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites *at bargain prices*." (*Renton, supra*, 475 U.S. at p. 54, 106 S.Ct. at p. 932, italics added.)

But the Renton ordinance did not limit the location of adult bookstores to specific physical facilities, as does the ordinance at bench: it merely specified certain distance requirements. (*Renton, supra*, 475 U.S. at p. 43, 106 S.Ct. at p. 926; see also *Playtime Theaters, Inc. v. City of Renton, supra*, 748 F.2d at pp. 529-530.) Within the 520 acres not

occupied by the incompatible existing facilities, an adult bookstore owner was free to build or buy a small mom-and-pop store, for example, and there operate the book business. Renton's ordinance, in sum, provided for " '[a]mple, accessible real estate.' " (475 U.S. at p. 53, 106 S.Ct. at p. 932.) The United States Supreme Court was declaring only that the city need not locate economically advantageous sites for an adult bookstore, any more than it need do so for a Shakespearian festival, an art museum, symphony hall, or a repertory movie theater.

That is not the situation before us. The city conceded the distance rules ban adult bookstores. The record reveals the alternatives to be purely illusory. Alas, those facts do not appear to perturb the majority. If the law's majestic equality can forbid rich and poor alike to sleep under bridges,[9] then apparently in the majority's view the law may with equally lofty impartiality permit an adult bookstore to locate anywhere available to Saks Fifth Avenue. *Renton*, however, does not countenance such prohibitions disguised as mere restrictions: immediately after the statement that the law does not require cities to guarantee sites at bargain prices, the court held that a city must "refrain" from effectively denying . . . a *reasonable* opportunity to open and operate an adult theater within the city. . . . " (475 U.S. at p. 54, 106 S.Ct. at p. 932, italics added) – an opportunity to obtain " '[a]mple, *accessible*

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[9] Anatole France, Le Lys Rouge (as printed by Calmann-Levy, Editeurs (1918)), chapter 7, page 118.

real estate' " (*id.* at p. 53, 106 S.Ct. at p. 932, italics added).[10]

The complete cynicism of National City's ordinance is easily exposed. For the ordinance permits adult bookstores to locate precisely where the values the ordinance is ostensibly designed to protect – what the majority opinion refers to as "the moral climate of the community as a whole" (maj. opn., *ante*, p. 710 of 12 Cal.Rptr.2d, p. 232 of 838 P.2d) – are entirely vulnerable. A family-oriented shopping mall, with small children wandering about and adolescents congregating after school, would seem to be the last place the city would prefer an adult bookstore to locate, even if city officials truly believed the mall owner would permit it.

In conclusion, the record shows National City's ordinance to be in effect a complete proscription of First

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[10] See also *Walnut Properties, Inc. v. City of Whittier* (1988) 861 F.2d 1102, in which the Ninth Circuit held unconstitutional a city ordinance that was more generous than is National City's in that it would at least allow a handful of adult businesses to operate (see particularly pp. 1107-1109). The court concluded, "To hold . . . that there are adequate alternatives available for expression of this sort would make a mockery of First Amendment protections and would render meaningless the Supreme Court's admonition that an ordinance must not 'effectively den[y] . . . a reasonable opportunity to open and operate an adult theater within the city.' *Renton*, 475 U.S. at 53-54, 106 S.Ct. at 932." (*Id.* at p. 1109.)

This court's recent decision in *People v. Superior Court (Lucero)* (1989) 49 Cal.3d 14, 259 Cal.Rptr. 740, 774 P.2d 769 adds nothing to the majority's constitutional surmises. The opinion only briefly alludes to the economic-impact discussion in *Renton* and does not contravene my discussion of that issue here. (See 49 Cal.3d at p. 25, fn. 6, 259 Cal.Rptr. 740, 774 P.2d 769.)

Amendment-protected adult businesses. The bookstore cannot locate anywhere now, and it would take several years for its owners to be able to built an entire commercial mall, assuming it is feasible and they can afford to do so. Therefore, under the First Amendment as interpreted in *Renton*, the ordinance cannot stand.[11]

III

National City is said to be a venerable municipality more than 100 years old. No doubt. I must add that the First Amendment is also venerable, it being the foundation of a free society. (See generally my concurring and dissenting opinion in *People v. Superior Court (Lucero), supra*, 49 Cal.3d at pp. 28-34, 259 Cal.Rptr. 740, 774 P.2d 769.)

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[11] Justice Baxter's own reference to the third witness's testimony in footnote 1 of his concurring opinion, *ante*, makes unpersuasive his statement that the neighbors did not establish an abatable common law nuisance as a matter of law. But if he is correct on this point, then *Renton, supra*, 475 U.S. 41, 106 S.Ct. 925, applies squarely; and without state law complications there can be no obstacle to the United States Supreme Court hearing the case and correcting the majority opinion's faulty constitutional reasoning.

Moreover, I find irrelevant Justice Baxter's statement that there was no evidence a clean, well maintained bookstore would be unable to acquire space in a mall. He fails to consider that the burden is on the city to show that reasonable alternative avenues of communication exist. The city offered no evidence that a mall would lease space to an adult bookstore.

The judgment of the Court of Appeal should be reversed on the basis of common law public nuisance.[12] The balance of the majority opinion cannot be supported.

KENNARD, J., concurs.

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[12] In stating that the Court of Appeal's judgment must be reversed, I do not mean to sanction the use of the Civil Code's restatement of the common law of nuisance as a pretext for ridding a community of First Amendment-protected activity. The federal high court has also cautioned that if would take a dim view of any such action. (*Arcara v. Cloud Books, Inc., supra,* 478 U.S. 697, 707 fn. 4, 106 S.Ct. 3172, 3178, fn. 4; accord *id.* at p. 708, 106 S.Ct. at p. 3178 [conc. opn. of O'Connor, J.].) There is no such risk here, however: Chuck's was proven to be a common law public nuisance and the city's action was not pretextual in that regard.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF NATIONAL CITY, Plaintiff and Appellant, v. STEVEN D. WIENER et al., Defendants and Respondents.	S020887 (Ct. App. No. D010801) (San Diego Super. Ct. No. 578784) (Filed Jan. 21, 1993)

MODIFICATION OF OPINION

THE COURT:

The opinion, which appears at 3 Cal.4th 832, is modified in the following respects:

1. The sentence beginning on line 8 of page 838, which currently reads "Moreover, the evidence indicated that two leasing agents of certain developed property had said in response to respondents' expert witness's anonymous telephone inquiry that they would not generally rent to adult businesses" is deleted and replaced with the following: "Moreover, respondents' expert witness testified that none of these three malls would rent space to an adult entertainment business. The witness recounted telephone conversations with leasing agents from two of the malls during which the witness inquired generally

whether those malls would rent space to an adult business, without identifying a particular business."

2. The sentence beginning on line 8 of page 848, which currently reads, "The record here in fact reveals that vacancies existed at all three shopping centers, and that the evidence of landowners' unwillingness to rent consisted essentially of generalized responses by two leasing agents to respondents' expert's anonymous telephone inquiry, and testimony that it is generally known among realtors that shopping centers do not usually rent to adult businesses" is modified to read as follows: "The record here in fact reveals that vacancies existed at all three shopping centers, and that the evidence of landowners' unwillingness to rent consisted essentially of generalized responses by leasing agents to respondents' expert's telephone inquiry, and testimony that it is generally known among realtors that shopping centers do not usually rent to adult businesses."

3. Footnote 9, which appears on pages 846 and 847 is modified to replace the phrase "that this characteristic lends them to placement within a structure that is not exposed directly to the street" with the phrase "do not require 'high visibility' locations" so that the footnote reads as follows: "Moreover, there was testimony that adult businesses are considered 'destination retail,' i.e., they deal in goods that consumers specifically seek out wherever they are located and do not require 'high visibility' locations. 'Destination retail' businesses are such that if they do relocate, their clientele will typically follow."

4. The sentence beginning on line 8 of page 849 is modified to add the word "partially" before the word "developed" so that the sentence reads: "The city has demonstrated that there are three shopping centers, and a partially developed 4.5-acre area, where an adult business may seek to rent an existing location."

This modification does not effect a change in the judgment.

APPENDIX C

Fourth Appellate District, Division One, No. D010801
S020887

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Jan. 21, 1993)

CITY OF NATIONAL CITY, Respondent

v.

STEVEN D. WIENER Et Al., Appellants

Petition for rehearing and request for stay of remittion DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Opinion modified.

/s/ Malcolm Lucas
Chief Justice

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN D. WIENER et al., Defendant and Appellant.	D010801 (Super. Ct. No. 578784) (Filed March 26, 1991)

APPEAL from a judgment of the Superior Court of San Diego County, Vincent P. Di Figlia, Judge. Reversed.

The City of National City (City) filed a complaint against Steven Wiener, individually and doing business as Chuck's Bookstore, and Patricia Saunders (collectively Wiener) seeking a preliminary and permanent injunction to restrain operation of Chuck's Bookstore (Chuck's). The complaint pleaded Chuck's was a common law and statutory nuisance and violated sections of the National City Municipal Code.[11] The trial court's grant of a preliminary injunction was reversed on appeal. After trial the superior court found section 18.69.030 to be valid and granted a permanent injunction requiring immediate closure of Chuck's. We hold section 18.69.030, *on the record before us,*

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[11] All statutory references are to the National City Municipal Code unless otherwise specified.

is an impermissible restriction on protected speech, and therefore reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In December 1986 Wiener opened Chuck's, an adult bookstore and arcade, at 929 National City Boulevard in National City.[12] On December 18, 1989, City filed a complaint alleging Chuck's is a common law public nuisance[13] and a statutory public nuisance because it violates the section 18.69.030 requirements imposed on adult entertainment establishments.[14]

Prior to opening Chuck's at 929 National City Boulevard, Wiener had operated another adult bookstore and arcade at 829 National City Boulevard. This earlier store was the subject of a prior suit for injunction, which resulted in a decision by this court, *City of National City v. Robbie Canter, Steven Wiener et al.* (4 Civ. No. 28541) filed

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[12] An adult bookstore is defined in the municipal code as a business which devotes more than 15 percent of the total floor area utilized for the display of books and periodicals to the display and sale of materials which emphasize the depiction or description of "specified anatomical areas" or "specified sexual activities" or "instruments, devices or paraphernalia which are designed for use in connection with specified sexual activities."

[13] The complaint alleged Chuck's is a common law nuisance in that it "interferes with and is injurious to the orderly and planned use of land resources."

[14] The complaint also alleged Wiener was occupying a building without an occupancy permit in violation of section 18.120.020; had erected a sign without a permit in violation of section 18.62.020; and was transacting business without a license in violation of section 6.04.040.

October 13, 1983, declaring National City's then current ordinance disallowing adult businesses in City's central business district to be a constitutionally impermissible prohibition on protected speech.[15] After the earlier store was closed by City during redevelopment, Wiener opened Chuck's at 929 National City Boulevard where it became the subject of the current lawsuit.

In the current case the superior court granted City's request for a preliminary injunction requiring the immediate closure of Chuck's. We granted a stay and then granted a writ of supersedeas staying the preliminary injunction until determination of the appeal of the preliminary injunction. In a decision filed December 11, 1987

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[15] The opinion held a prohibition disallowing adult entertainment establishments in the central business district was too restrictive in that it prohibited the possession, sale or display of even one adult book or film in the central business zone and made no showing there were significant alternatives. We find no reference to a prohibition of adult businesses in the central business district in current section 18.69.030. Present restrictions involve only the distances required between adult entertainment establishments and other uses plus the exception allowing adult businesses in enclosed malls. We presume the reference to the central business district was deleted by 1987 amendments to the code section referenced in section 18.69.030. As the parties do not mention this difference between the earlier and present code sections and City's complaint only alleges Chuck's is in violation of the distance requirements, we assume the deletion of that particular restriction is of no practical moment to our case. Because the earlier opinion mentioned only the prohibition against adult businesses in the central business district, however, we conclude that opinion does not establish the law of the case relative to this appeal.

(D005952 and D005951), we reversed the grant of preliminary injunction on the basis that from the record then before the court we could not conclude there was a reasonable probability City would prevail at trial on the question of whether City's ordinance, as drawn, effectively bars adult bookstores from National City.[16]

The case then proceeded to trial. After a three-day trial the superior court found section 18.69.030 constitutionally valid and granted a permanent injunction requiring Chuck's immediate closure.[17] Wiener filed an appeal and a petition for writ of supersedeas and requested an immediate stay from this court. On September 1, 1989, we stayed the trial court's order until on or before September 11, 1989. The temporary stay was vacated on October 2, 1989.

DISCUSSION

Section 18.69.030 requires that an adult business not be located "within one thousand five hundred feet of another adult entertainment establishment or within one thousand five hundred feet of any school or public park

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[16] Our court stated: "We emphasize 'this record' because nothing we opine here bears upon the right of the City at trial to adduce evidence of the sort noted in City of Vallejo [*City of Vallejo v. Adult Books* (1985) 167 Cal.App.3d 1169] demonstrating the availability of sites for adult bookstores such as to persuade the court the ordinance does not prohibit or severely limit access to protected expression."

[17] Evidence was presented that Chuck's location violated the distance requirements of the ordinance and municipal code requirements and therefore was a public nuisance. The court thus enjoined its operation.

within the city or within one thousand feet of any residentially zoned property in the city." Section 18.69.030 also provides an exception to this restriction:

> "Nothing in this chapter prohibits the location of adult entertainment establishments within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property."

The superior court issued a written statement of decision finding that section 18.69.030 "is a reasonable 'time, place and manner' regulation serving a substantial government interest and does not unreasonably limit alternative avenues of communication."

Whether section 18.69.030 serves a substantial governmental interest and does not impose an unreasonable limitation on alternative locations for adult entertainment establishments is a question of law and thus must be reviewed de novo. (*Walnut Properties, Inc. v. City of Whittier* (9th Cir. 1988) 861 F.2d 1102, 1108; *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1201.) "Interpretation and applicability of a statute orordinance is clearly a question of law." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 242, p. 247.) "It is the duty of the appellate court to make the final determination from the undisputed facts and the applicable principles of law." (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.) Although we afford great weight to the trial court's factual findings (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64), the final determination of

whether the ordinance is unreasonably restrictive of protected speech must be reviewed de novo.

The First Amendment protects sexually explicit communication. However, governments may place such communication in a special category for purposes of regulation because of the unusual nature of the communication. (*Young v. American Mini Theatres* (1976) 427 U.S. 50, 70-71.) A city may place restrictions on the time, place and manner of sexually explicit communication so long as the restrictions are designed to serve a substantial governmental interest and do not "unreasonably limit alternative avenues of communication." (*Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 46-47.)[18]

City's ordinance fulfills the first requirement. City presented ample evidence at trial that the ordinance is designed to serve the important interests of decreasing problems of blight, crime prevention, and protection of City's commercial tax base, by dispersing adult entertainment businesses. City Planning Director Roger Post testified to City's problems with urban blight, transiency, crime and its heavy reliance on a commercial tax base. Post explained City's "strip" zoning configuration, which causes residential and commercial uses to be next to each

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[18] In *Renton*, the court determined the ordinance in question there was not aimed at the "content" of adult motion picture films, but at their secondary effects on the surrounding community. The ordinance was designed to prevent crime, protect retail trade in the city of Renton, protect property values, and preserve the quality of urban life. (*Renton v. Playtime Theatres, supra*, 475 U.S. at pp. 47-50.)

other, and detailed City's attempt to disperse adult entertainment establishments in order to eliminate secondary effects of such businesses. Janice Martinelli, whose residence is across an alley from Chuck's, testified to undesirable activities by Chuck's patrons who entered and exited Chuck's from a back door on the alley. Two reporters from a local newspaper also testified to undesirable activities inside Chuck's and in the alley behind it. The evidence showed the deleterious effects of Chuck's operation on the adjacent neighborhood. We find the ordinance to be reasonably designed to lessen the considerable secondary effects of adult entertainment establishments by dispersing them and requiring they be located away from residences, schools and parks.

In order that an ordinance which restricts the location of adult businesses not unreasonably limit protected speech, it must also contain provisions for alternative sites.

Post testified that the distance requirements in section 18.69.030 would limit the land available to Chuck's to 4.5 acres out of City's total area of 8.65 square miles. He admitted that to impose a significant distance requirement between residences and potential adult businesses would constitute a de facto ban. Post said the purpose of the exception allowing adult businesses in enclosed malls is to make more areas available. Three shopping centers were identified as fulfilling the enclosed mall requirements, and in addition, Post stated there were 572 acres of commercially zoned vacant land available which would conform to ordinance provisions.

Commercial real estate broker Linda Karen Greenberg testified that excluding shopping centers and undeveloped commercial land, there is only one available site where Chuck's could relocate. She acknowledged that location is already rented. She stated there were vacancies in the three existing enclosed shopping centers in City and said although she had not inquired whether the centers would rent to an adult entertainment business, she would not be surprised if they refused. Greenberg also stated land on which to locate a new shopping center could be acquired for $12 to $30 per square foot or one-half to 1.2 million dollars per acre and construction costs would be $20 to $40 per square foot.

Consultant Tony Solis testified he had contacted the leasing agents for City's three existing enclosed shopping centers each of whom stated he would not lease to an adult bookstore. Consultant Cliff Beck testified that development of an enclosed mall would cost a total of about six million dollars.

The evidence is undisputed that under the ordinance a new or relocating adult entertainment business would be limited to locating in a four-acre site, which includes one building, already rented to an ongoing business, plus vacant land; or to three existing enclosed malls, the agents for which had indicated a refusal to rent to an adult business; or to 572 acres of undeveloped commercial land where an enclosed mall could be built in order to accommodate adult entertainment businesses. No direct evidence was presented regarding whether building a new center where an adult business would meet the code requirement would be economically viable for an adult bookstore owner, although there was testimony

regarding the high cost and expertise required for such construction.

In *Young v. American Mini Theatres, supra,* 427 U.S. at page 71, the Supreme Court held that protected communication was not overly burdened by Detroit's zoning ordinance which required new adult bookstores and other regulated uses to be not less than 1,000 feet from each other and not less than 500 feet from a residential area. The court noted the ordinance was merely a limitation on places where adult films could be shown and explained:

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight." [sic] (*Id.* at pp. 71-72, fn. 35.)

In *City of Renton v. Playtime Theatres, Inc., supra,* 475 U.S. 41 at page 43, the City of Renton adopted a zoning ordinance which attempted to disperse adult film theaters by prohibiting their location within 1,000 feet of a residential zone, single or multiple family dwelling unit, church, park or school. The Supreme Court noted that the ordinance left 520 acres, or more than 5 percent, of the total land area of Renton open for adult theater sites and the district court had found that this 520 acres included " 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping

space that is criss-crossed by freeways, highways, and roads.' " (*Id.* at p. 53.) The Court discounted the argument that some of the land was already occupied by existing businesses and there were no " 'commercially viable' " adult theater sites within the 520 acres. The Court opined:

> "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' [citation] we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related business for that matter, will be able to obtain sites at bargain prices. . . . ('The inquiry for First Amendment purposes is not concerned with economic impact.')" (*Id.* at p. 54.)

Several courts have declared ordinances imposing distance requirements on adult entertainment establishments to be unconstitutional prohibitions on protected speech if the ordinances allow little opportunity for such businesses to operate.[19] However, if a government can

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[19] In *Walnut Properties v. City of Whittier, supra,* 861 F.2d 1102, the court found that in light of the requirement adult businesses be situated at least 1,000 feet from each other, only a small handful of such businesses would be allowed in the city of Whittier. The court held the ordinance impermissibly restricted protected expression. (*Id.* at pp. 1108-1110.) In *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, the court held that the Stanton ordinance prohibiting adult businesses within 500 feet of any church, school, park, playground or residential area and within

establish there are reasonably available sites which would allow the operation of adult businesses under an ordinance restricting their location, such an ordinance will pass constitutional muster.[20]

The City's regulation here on its face does not appear to be unreasonably restrictive. But we are mindful of the

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1,000 feet of each other was too restrictive. The court noted because Stanton has such a small area (3.5 square miles) the separation requirement made so few sites available that lawful speech was overly limited. (*Id.* at pp. 1564-1567.) The court in *Alexander v. City of Minneapolis* (1983) 698 F.2d 936 held an ordinance forbidding an adult business within 500 feet of a residential zone, office residence zone, church, day-care facility, or school or within 500 feet of another adult business would greatly restrict access to constitutionally protected material and thus was impermissible.

[20] In *City of Vallejo v. Adult Books, supra,* 167 Cal.App.3d 1169, Vallejo enacted an ordinance providing that adult bookstores and adult theaters would be allowed only in three zoning districts and could not be located within 500 feet of a residential zone, park, playground, library, or school or within 1,000 feet of another such business. (*Id.* at pp. 1172-1173.) The appellate court determined the city had established the existence of alternative sites for the restricted uses and thus demonstrated there was no government attempt to suppress protected communicative activity. (*Id.* at p. 1180.) The court in *Castner v. City of Oakland* (1982) 129 Cal.App.3d 94, 98, 99 held that an ordinance forbidding adult entertainment activity within 1,000 feet of a residential zone was not designed to impermissibly restrict free expression. *In* [sic] *Walnut Properties, Inc. v. City Council* (1980) 100 Cal.App.3d 1018, 1023, the court held that an ordinance which among other restrictions prohibits locating an adult entertainment business within 500 feet of a residential area or 1,000 feet of a school was reasonable. It further observed that the appellant had presented no evidence indicating the ordinance restricts access to adult entertainment.

concern expressed by national as well as our state courts over the actual and practical effect restrictive ordinances will have upon the free exercise of expression. In considering the strictures of the geography of National City, as well as the apparent aversion shopping mall landlords have toward the presence of adult entertainment shops on the premises, we find there is an impediment to Chuck's relocation. From our record we presume National City's "strip" zoning configuration means that the commercial zone consists of narrow strips which abut residential zones, thus the requirement that adult businesses be at least 1,000 feet from residences and 1,500 feet from schools and parks restricts adult businesses from almost all of the commercial zone.[21] At trial the City appeared to acknowledge that the ordinance would be too restrictive without the safety valve of the opportunity to locate in enclosed malls. The purported alternative, however, is illusive. Consultant Tony Solis testified that agents from the three existing shopping malls told him they would not rent to an adult business. There was testimony that adult entertainment businesses would not be compatible with family-oriented businesses in a typical large retail shopping center. Although City proposes as a viable alternative the building of one's own million dollar shopping center in order to operate a typical "porno" establishment, the record shows the initial cost would be from something over one million to six million

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[21] Two maps admitted into evidence during trial as court's exhibits 15 and 16 appear to bear out this assumption. On our own motion we have caused these exhibits to be transmitted to this court and deemed them to be part of the record on appeal. (Cal. Rules of Court, rule 12.)

dollars. We infer such an endeavor would not be economically feasible for the typical adult business entrepreneur.

We do not take lightly our conclusion of invalidity of the city ordinance. We would have preferred, before reaching this conclusion, to have had a more detailed record. We cannot be certain from the record before us that Chuck's is precluded from locating in the commercial zone save for the limited exceptions we have discussed, nor whether the four- and one-half-acre site referred to would be a viable location. On this record, however, we must conclude that the ordinance is too restrictive. It is not overly limiting on its face and would not be unconstitutional in all circumstances. However, considering City's configuration, almost all adult businesses appear to be precluded. We note that at oral argument it was represented that City has a population of over 57,000 and has only one adult entertainment business in operation. Although not controlling, this factor does indicate that as a practical matter the ordinance is highly restrictive. City has not shown there are practical alternative locations for adult entertainment establishments, and thus ordinance 18.69.030 is an impermissible restriction on protected speech.

DISPOSITION

The judgment is reversed.

/s/ Froehlich
FROEHLICH, J.

WE CONCUR:

/s/ Huffman
HUFFMAN, Acting P.J.

/s/ Nares
NARES, J.

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA; CITY OF NATIONAL CITY, a municipal corporation, Plaintiffs, v. STEVEN D. WIENER, STEVEN D. WIENER dba CHUCK'S BOOKSTORE; PATRICIA SAUNDERS; DOES 1 through 30, inclusive, Defendants.	CASE NO. 578784 JUDGMENT GRANTING PERMANENT INJUNCTION

The above-entitled cause came on regularly for trial, before the Honorable Vincent P. DiFiglia [sic] on May 30 through June 1, 1989. Plaintiffs appeared by counsel Linda Kaye Harter, Assistant City Attorney. Defendants Steven D. Wiener and Patricia Saunders, et al appeared by counsel Norman R. Atkins, Esquire. Evidence, oral and documentary, was presented, and the matter was argued to the court. Upon proof made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDER, ADJUDGED AND DECREED that a public nuisance exists by reason of defendant's establishment, maintenance, and operation of an adult business known as Chuck's Bookstore at 929 National City Boulevard, National City, and that the same shall be abated by the defendants Steven D. Wiener and Patricia Saunders forthwith.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Steven D. Wiener and Patricia Saunders, et al, and all persons acting on their behalf, are forthwith permanently enjoined, restrained, and prohibited from establishing, maintaining, and operating an adult business, including an adult bookstore, at 929 National City Boulevard, National City.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs are to recover their costs of suit.

Dated: August 29, 1989

/s/ Vincent P. Di Figlia
VINCENT P. DI FIGLIA
JUDGE OF THE
SUPERIOR COURT

APPROVED AS TO FORM:

/s/ Linda Kaye Harter
LINDA KAYE HARTER,
Assistant City Attorney
Attorney for Plaintiffs

NORMAN R. ATKINS, Esquire
Attorney for Defendants

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA; CITY OF NATIONAL CITY, a municipal corporation, Plaintiffs, v. STEVEN D. WIENER; STEVEN D. WIENER dba CHUCK'S BOOKSTORE; PATRICIA SAUNDERS, et al., Defendants.	Case Number 578784 **STATEMENT OF DECISION** (Filed Aug. 18, 1989)

In this action plaintiff City of National City seeks a preliminary and permanent injunction enjoining the continued operation of defendants' adult bookstore. The City claims that the establishment constitutes a common law and statutory nuisance and that the store is operating in violation of numerous sections of the Municipal Code.

National City Municipal Code Sections 18.69, et seq. govern the regulation of the adult entertainment business within the City. The parties have stipulated that defendants' bookstore is an "adult entertainment business" within the meaning of the regulatory provisions here in issue. Plaintiff does not contend that the materials purveyed in defendants' store are pornographic. Consequently, for purposes of this decision, it is presumed that

defendants' business is entitled to First Amendment protection.

The City claims five bases for the relief prayed for. These are:

1. The distance requirements of Municipal Code Section 18.69.030;

2. The prohibition against viewing films in private viewing rooms pursuant to Municipal Code Section 18.69.090;

3. The requirement for obtaining a business license under Municipal Code Section 6.04.040;

4. The requirement of an occupancy permit under Municipal Code Section 18.120.020; and

5. The requirement of a building permit and site plan review under Municipal Code Section 18.62.020.

With respect to the business license, occupancy permit and building permit/site plan review violations, the testimony of Mr. Wiener was undisputed that he has made application for these items, but the City has summarily denied them. It is reasonable to infer from the evidence that the basis for denial was noncompliance with the distance requirements of Municipal Code Section 18.69.030 and the prohibition against private viewing booths provided by Section 18.69.090. Accordingly, this decision will focus on the sufficiency of those two grounds to support plaintiff's claim for relief.

Section 18.69.030 prohibits an adult entertainment establishment from locating within 1500 feet of another

adult entertainment establishment, within 1500 feet of a school or park, or within 1000 feet of a residential zone.

By Ordinance No. 1790 adopted on January 25, 1983, Section 18.69.030 was amended to provide that:

> "Nothing in this Chapter prohibits the location of adult entertainment activities within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property, . . . "

The foregoing amendment was added after the District Court of Appeal, in an unpublished opinion, found the Ordinance unconstitutionally restrictive. (*City of National City v. Robbie Canter,* 4 Civ. No. 28541, Court's Exhibit 7.)

In *Renton v. Playtime Theatres, Inc.*, ___ U.S. ___, 89 L.Ed. 2d 29, 37 (1986), the Supreme Court reaffirmed that in the municipal regulation of First Amendment protected adult entertainment:

> " 'content neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." [Citations.]

The initial inquiry must begin with the question of whether the Ordinance is designed to serve a substantial government interest.

Roger G. Post, Planning Director of the City testified that the Ordinance was enacted as part of a comprehensive scheme of urban redevelopment in the City. According to Mr. Post, National City is "worn out". [sic] It suffers the second highest rate of crime in San Diego County, its population is largely transient and its population's per capita income is the lowest or next to lowest in the County. Urban blight is rife throughout the City. The City is heavily reliant on its commercial tax base for revenue. Mr. Post testified that the City is "strip zoned". [sic] Since strip zoning can result in residential property abutting commercial property, attendant problems of noise, traffic, pollution and crime can and do occur.

The evidence established that a residential area known as Brick Row is located across the back alley from defendants' bookstore. The evidence further established that the presence of Chuck's Bookstore in the neighborhood has led to "secondary effects" on the community which are proper areas of government concern. See *Renton v. Playtime Theatres, Inc., id. supra* at pp. 37-40.

Mrs. Janice Martinelli testified that she is an owner/resident of Brick Row. She has lived there for more than eight years. Mrs. Martinelli claims that since Chuck's Bookstore moved into its present location, the character of the neighborhood has changed. She has observed men in her back yard urinating. She has found condoms and adult reading material in her yard. Her son has been chased by a Chuck's Bookstore patron. She no longer allows her son to play in the back yard. Mrs. Martinelli has herself been accosted by Chuck's patrons who have made sexual overtures to her. Mrs. Martinelli testified that she was aware of no such problems as a result of

operations of the Pussycat Theater, another adult establishment operating near Chuck's. Mrs. Martinelli is pursuing a civil action of her own against Chuck's.

Dane David Schiller testified that he had investigated Chuck's Bookstore in connection with a series of articles he wrote for the Star News. He estimates he was in the store between 10 and 15 times. He claimed to have observed puddles of urine and semen in the viewing booths and patrons exiting the back door and congregating in the bushes in the vicinity of the Brick Row houses. Mr. Schiller also claims that there were "glory holes" between the video booths.

Mr. Rich Chriss, circulation manager for the Star News testified that he worked with Mr. Schiller on the articles and visited Chuck's approximately 30 times in connection with that assignment. Mr. Chriss testified that on four or five occasions he observed male patrons sticking their penises through the glory holes. He further testified that he observed acts of oral copulation between males on two or three occasions and anal copulation between two males in the alley behind Chuck's.

Based on the testimony of Mr. Post, plaintiff City has proved by a preponderance of the evidence that the Ordinance is designed to serve a substantial government interest, that is, to alleviate urban blight.

The testimony of Messrs. Schiller and Chriss and Mrs. Martinelli unquestionably established that Chuck's Bookstore has engendered the undesirable "secondary effects" sought to be controlled.

The *Renton* court set out a two pronged test. It is not enough that the Ordinance in question serves "a substantial government interest". [sic] Further, "it must not unreasonably limit alternative avenues of communication". [sic] *Renton v. Playtime Theatres, Inc., id. supra.*

It is in regard to this second prong that the evidence is most troublesome. Defendants contend that the Ordinance is drafted in a fashion which effectively precludes Chuck's Bookstore from relocating anywhere within the City.

Mr. Jack Kearney, Code Enforcement Officer for the City testified that Chuck's is in violation of the distance restrictions as defined in Section 18.69.030, since it is within a distance of approximately 150 feet from another adult entertainment establishment, the Pussycat Theater, and within 60 to 100 feet of the Brick Row residential area.

Mr. Post conceded that in his view the distance restrictions might be too severe insofar as they would limit the land available for relocation to some 4.5 acres in a city whose total area is 8.65 square miles. Mr. Post testified that the purpose of the retail shopping center exclusion was to broaden the availability of sites where an adult entertainment business could be located.

He identified three available shopping centers which meet the requirements of the Ordinance: Plaza Bonita Shopping Center, South Bay Plaza and Sweetwater Town and Country. In addition, he testified that there are 572 acres of commercially zoned vacant land available for construction of commercial space conforming to Ordinance specifications.

Ms. Linda Karen Greenberg, a commercial real estate broker for Grubb and Ellis, testified that she was employed to survey commercial sites that would conform to adult bookstore use under the provisions of Section 18.69.030.

If one excludes shopping centers, and undeveloped commercial land, there is only one site available which conforms to the Ordinance. This location is at 1 West 35th Street and is presently rented.

Ms. Greenberg testified that vacancies exist at all three previously named shopping center [sic]. However, she admitted that she had not checked to see if the centers would be willing to rent to an adult bookstore. She conceded it would not surprise her to hear that the shopping centers would decline to rent to Chuck's Bookstore. Ms. Greenberg further conceded that not all portions of South Bay Plaza or Sweetwater Town and Country would conform to the specifications of the Ordinance. She estimated that 5,000 square feet of space at Sweetwater Town and Country and 12,000 square feet of space at South Bay Plaza would meet the Ordinance's criteria.

Concerning the costs of developing commercially zoned property, Ms. Greenberg is of the opinion that land may be acquired at a cost of $20.00 – $30.00 per square foot and that constructions [sic] costs would run between $20.00 – $40.00 per square foot.

Defendants called Mr. Tony Solis, a principal in Redevelopment Consultants of America, Inc. Mr. Solis testified that the main function of his business was to assist both cities and individuals in businesses which are

being affected by redevelopment projects and public works projects. Mr. Solis has been in this business for seven years. He has represented other individuals who have been displaced by the National City Redevelopment Program. At the request of defendants, Mr. Solis contacted all three of the shopping centers whose characteristics conform to the requirements of Section 18.69.030. He inquired of the leasing agents if they would rent to either a "soft or hard core porno bookstore". [sic] South Bay Plaza, Sweetwater Town and Country and Plaza Bonita all indicated that they would not rent to such an establishment.

Mr. Cliff Beck, who is Mr. Solis' associate at Redevelopment Associates of America, Incorporated, testified that he has 40 years experience in the contracting field. He holds a general contracting license and has worked on many commercial projects including K-Mart stores, Cerritos Mall, Del Amo Shopping Center, Northridge Shopping Center and many hospitals and office buildings.

In Mr. Beck's opinion, if one were to build a commercial center conforming to the requirements of the Ordinance, it would require four acres of land which would cost approximately $1,750,000. Construction costs for a 60,000 square foot building would cost an additional $4,750,000.

Plaintiff has established that there are shopping centers in existence in the City which could accommodate defendants' business and comply with the Ordinance. Plaintiff has further demonstrated that an abundant

amount of land exists for development of commercial edifices which would conform to the Code requirements.

Defendants counter that the availability is illusory since none of the existing sites are willing to rent to them, and the cost of building their own establishment in compliance with Section 18.69.030 is exorbitant. Under the defense scenario, the requirements of the Ordinance constitute a *de facto* ban on First Amendment protected activity and therefore "unreasonably limit alternative avenues of communication" in violation of the second prong of *Renton v. Playtime Theatres, Inc., supra.*

It must be pointed out that while defendants have supplied ample evidence that the cost of new construction is high, there is no direct evidence that such an alternative is not economically viable.

However, assuming *arguendo* that the Ordinance seriously restricts economic viability, this argument has already been answered by both the Federal and California Courts:

> "Finally turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of '[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is crisscrossed by freeways, highways, and roads.' App [sic] to Juris Statement 28a.

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees at 34-37. The Court of Appeals accepted these arguments,[3] concluded that the 520 acres was not truly 'available' land, and therefore held that the *Renton* ordinance 'would result in a substantial restriction' on speech. 748 F2d, at 534.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' American Mini Theatres, 427 US, at 71, n 35, 49 L Ed 2d 310, 96 S Ct 2440 (plurity [sic] opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 49 L Ed 2d 310, 96 S Ct 2440 (Powell, J., concurring) ('The inquiry for First Amendment purposes is not concerned with economic impact'). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before

us easily meets this requirement." *Renton v. Playtime Theatres, Inc.*, 89 L.Ed. 2d at pp. 41-42 [sic].

"While evidence of the impact of the ordinance upon public access to adult theatres and bookstores was disputed, we think respondent established without doubt the existence within the city of reasonably available sites conforming to the zoning and distance requirements of the ordinance for operation of 'adult bookstores' and 'adult theatres,' thereby meeting its burden of demonstrating the absence of a governmental attempt at suppression of First Amendment activity. We are mindful that appellant produced by expert testimony evidence of the considerable economic difficulty of locating 'adult' uses at many legally permissible sites within the City of Vallejo. Such evidence, however, falls far short of establishing that appellant is foreclosed or unreasonably restricted by the ordinance from effectively operating within the city limits. The issue is one of degree, and we are satisfied that the limitations based upon prospective relocation are not onerous. We are also convinced that the ordinance will not result in an oppressive and hence unconstitutional restriction of public access to adult material as found, for example, in *Alexander v. City of Minneapolis* (D.C.Mn 1982) 531 F.Supp. 1162, affirmed 698 F.2d 936, and *Purple Onion, Inc. v. Jackson, supra*, 511 F.Supp. 1207, cases relied upon by appellant. We accordingly conclude that the ordinance is not so pervasive in its constraints as to violate appellant's First Amendment rights." [Citations.] *City of Vallejo v. Adult Books* (1985) 167 C.A.3d 1169 at p. 1180.

Based on the foregoing, the Court finds that Section 18.69.030 of the National City Municipal Code is a reasonable "time, place and manner" regulation serving a substantial government interest and does not unreasonably limit alternative avenues of communication.

The evidence clearly shows that the operation of defendants' bookstore at its present location of 929 National City Boulevard is in violation of Section 18.69.030.

The last issue for determination is whether defendants are maintaining private viewing rooms in contravention of Section 18.69.020(V) which provides:

> "A private viewing room is an area separated from the sales or display area of the establishment by a curtain, wall, door, shade or similar obstruction thus allowing the private viewing of video tapes, movies, transparencies, films or projectable motion pictures by customers at the establishments."

Unlike the revised Section 18.69.030 discussed earlier, the constitutionality of Section 18.69.020(V) has been passed on by our Appellate Court in the case of *City of National City v. Canter,* 4 Civ. No. 28541. Steven D. Wiener was a party to that lawsuit and, although not certified for publication, since it applies to the same parties and issues, it would appear to be authoritative under California Rules of Court 977(b)(l) as suggested in defendants' trial brief.

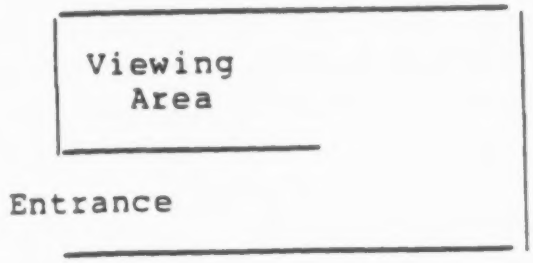
The sole area for inquiry here thus seems to be whether the booths in defendants' establishment are

constructed in such a fashion as to come within the prohibition of the Ordinance.

When the matter was previously before the Appellate Court, the booths at Chuck's Bookstore were equipped with lockable doors. The evidence adduced from Messrs. Chriss and Schiller conclusively establish that the sexual activity observed by them was at a time when these lockable doors were in existence.

Between March and April of 1988 and June of 1988, the lockable booths were removed. They no longer have doors. Mr. Chriss testified he saw no "glory holes" in the new booths, and there is no evidence of illicit sexual activity going on in the store with the new booths.

Testimony established that the configuration of the new booths is like a maze. One enters between two partitions, makes a 90° turn and is in the viewing area, thusly:



Several cases have dealt with the issue of enclosed viewing booths. See *EWAP, Inc. v. City of Los Angeles* (1979) 97 C.A.3d 179, *Ellwest Stereo Theatres, Inc. v. Wenner* (9th Cir. 1982) 681 F.2d 1243 and *County of Sacramento v. Superior Court* (1982) 137 C.A.3d 448.

All of these cases cite with approval the following language from *People v. Perrine* (1975) 47 C.A.3d 252 at p. 258.

> "A picture arcade is a business, carried on in a place which the public generally is invited to enter and use. Since it is a place of entertainment, its patrons are not expected to enter with the solemnity of a business visitor at a mercantile establishment. Ordinarily those entering a picture arcade are seeking amusement, relaxation or excitement, possibly sexual stimulation or gratification, depending on the taste or mood of the individual and the kind of pictures exhibited. Among such visitors it is foreseeable that some will be predisposed to conduct which is offensive, dangerous to others and even unlawful. The potential for misuse of the premises, for law violations, and for bodily harm to law-abiding patrons, is obvious, as is the concomitant need for continuous supervision."

The Court feels that the issue must be approached from the standpoint of whether the booths as constructed allow for continuous supervision and discourage unlawful use. Utilizing a definitional approach, the question could be decided either way.

It is clear that under their present configuration, there is no evidence of the unlawful conduct occurring with the predecessor booths. It is a reasonable inference that patrons can be and are being supervised effectively with the new configuration. Accordingly, the Court finds the present booths are not private viewing booths as defined by Section 18.69.020(V) and prohibited by Section 18.69.090.

By reason of the foregoing violation of Ordinance 18.69.030, plaintiff City of National City is entitled to a declaration that Chuck's Bookstore operated at 929 National City Boulevard, National City, constitutes a public nuisance.

Plaintiff's request for a preliminary and permanent injunction enjoining defendants and each of them, and all persons acting on their behalf, from establishing, maintaining and operating an adult business, including an adult bookstore at 929 National City Boulevard, National City is granted.

Counsel for plaintiff is directed to prepare the appropriate order reflecting this statement of decision.

DATED: August 18, 1989

/s/ Vincent P. Di Figlia
VINCENT P. DI FIGLIA
Judge of the Superior Court

APPENDIX G

Supreme Court of the United States

No.

A-770

Steven D. Wiener, Steven D. Wiener dba Chuck's Bookstore, and Patricia Sanders,

Petitioners

v.

City of National City, California

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 21, 1993.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 12th
day of April, 1993

APPENDIX H

U.S. CONSTITUTION

AMENDMENT I

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

U.S. CONSTITUTION

AMENDMENT XIV

"No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

NATIONAL CITY MUNICIPAL CODE

Chapter 18.69

ADULT ENTERTAINMENT ESTABLISHMENTS

Sections:

18.69.010 Purpose and intent.
18.69.020 Definitions.
18.69.030 Prohibitions.
18.69.035 Headshops, drug paraphernalia shops.
18.69.040 Measure of distance.
18.69.050 Development and maintenance standards.
18.69.060 Exceptions.
18.69.070 Other regulations, permits or licenses.
18.69.080 Protection of minors.
18.69.090 Private viewing rooms.

18.69.010 Purpose and intent. A. It is the purpose of this chapter to establish reasonable and uniform regulations to prevent the continued concentration of adult entertainment establishments, as defined herein, within the city of National City.

B. It is the intent of this chapter that these regulations be utilized to prevent problems of blight and deterioration which accompany and are brought about by the concentration of adult entertainment establishments. (Ord. 1699 § 3 (part), 1979).

* * *

18.69.030 Prohibitions. A. No person or entity shall own, establish, operate, control or enlarge, or cause or permit the establishment, operation, enlargement or transfer of ownership or control, except pursuant to Section 18.69.060, of any of the following adult entertainment establishments if such adult entertainment establishment is within one thousand five hundred feet of another adult entertainment establishment or within one thousand five hundred feet of any school or public park within the city or within one thousand feet of any residentially zoned property in the city, measured along street frontages:

1. Adult bookstore;

2. Adult motion picture theater;

3. Adult mini-motion picture arcade (peep shows);

4. Adult arcade;

5. Adult drive-in theater;

6. Adult cabaret;

7. Adult motel;

8. Adult theater;

9. Adult model studio;

10. Body painting studio;

11. Massage parlor;

12. Any other business which involves specified sexual activities or display of specified anatomical areas;

13. Adult video games;

14. Adult video cassette sales and rentals;

15. Sexual encounter establishment.

B. An establishment listed in this section shall not be established, operated, enlarged or transferred unless the provisions of the zone in which the site or proposed site is located permits such a use. The conduct of such establishment and the use of premises shall otherwise comply with the land use code and all other applicable regulations.

C. Nothing in this chapter prohibits the location of adult entertainment establishments within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property.

D. Massage parlors and sexual encounter establishments shall be permitted only upon the prior issuance of a conditional use permit. (Ord. 1919 § 1, 1987: Ord. 1790 § B, 1983: Ord. 1712 § 55, 1980; Ord. 1699 § 3 (part), 1979)

* * *

18.69.040 Measure of distance. The required minimum distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each such business. The distance between any adult entertainment business and any public school, public parks or residential zoned land shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of the adult entertainment business to the closest property line of the public school, public park or residential zone. (Ord. 1790 § C, 1983: Ord. 1699 § 3 (part) 1979).

18.69.050 Development and maintenance standards. All adult entertainment premises hereafter commenced shall, in addition to compliance with the land use code, be made to comply with these specific requirements:

A. Signs. Except for theater marquee signs, changeable copy signs, temporary signs and small permanent signs are not permitted. In addition to the requirements of Section 18.62.020 for permit approvals, all sign permits shall be subject to review and approval by the planning commission.

B. Exterior Painting. Buildings and structures shall not be painted or surfaced with garish colors or textures or any design that would simulate a sign or advertising message.

C. Advertisements, displays of merchandise, signs, or any other exhibit depicting adult entertainment activities placed within the interior of buildings or premises

shall be arranged or screened to prevent public viewing from outside such buildings or premises.

D. No outdoor loudspeakers or other outdoor sound equipment advertising or directing attention to an adult entertainment use is allowed.

E. Upon order of the city manager, graffiti appearing on any exterior surface of a building or premises, which graffiti is within public view, shall be removed and that surface shall be restored within seventy-two hours of notification to the owner or person in charge of the premises. (Ord. 1699 § 3 (part), 1979).

18.69.060 Exceptions. A. Any person having ownership or control of an adult entertainment business which is within one thousand five hundred feet of another such business or within one thousand five hundred feet of any public school, public park, or within one thousand feet of any residential zone on the date this section first becomes effective shall be permitted to transfer such principal ownership or control within a period of two years thereafter provided that the persons acquiring such ownership or control shall be required to discontinue and abate the uses transferred thereunder within a period not to exceed five years from the date of such transfer of principal ownership or control if such business continues to be within one thousand five hundred feet of any other such adult entertainment business or within one thousand five hundred feet of any public school or public park or within one thousand feet of any residential zoned property in the city.

B. Nothing in this section prohibits the transfer of principal ownership or control of adult entertainment

uses permitted under Sections 18.69.030, subparagraph three or 18.69.030, subparagraph five.

C. After the effective date of adoption of Section 18.69.030A, no such public school, public park or residential zoned area shall be allowed to commence within those minimum distances of separation.

D. Notwithstanding any other provision of this code to the contrary, the provisions of this chapter shall be applicable to all land within the city, including all redevelopment project areas now in existence or hereafter established. (Ord. 1790 § D, 1983: Ord. 1699 § 3 (part), 1979).

18.69.070 Other regulations, permits or licenses. A. Effect. The provisions of this chapter do not waive or modify any other provision of this code. Adult entertainment establishments shall comply.

B. Reference. This list is not all inclusive and is inserted here for reference only; other applicable regulations include: Chapters:

6.14 Adult Movies and Book Stores;
6.18 Amusement Arcades;
6.30 Dance Halls;
6.36 Escort Services;
6.43 Live Entertainment;
6.50 Massage Establishments;
6.58 Peep Shows;
10.34 Obscene Matter;
10.62 Pornography;
15.36 Peep Show Establishments.

(Ord. 1699 § 3 (part), 1979).

RELEVANT PORTION OF ADULT ZONING ORDINANCE OF THE CITY OF ESCONDIDO, CALIFORNIA
(Escondido Municipal Code § 33-822)

Sec. 33-822. Location of adult establishments.

(a) Adult establishments as defined in section 33-821 of this code shall be permitted only in the city only in certain commercial shopping centers listed below:

Center Name	**Address**
Albertson Center	601 N. Broadway
Alpha Beta Center	2040 E. Valley Parkway
Big Bear Center	2245-55 E. Valley Parkway
Del Norte Plaza	350 W. El Norte Parkway
Escondido Center (Von's)	2321-59 E. Valley Parkway
Felicita Plaza	325 W. Felicita
Ferrara Plaza	2405 E. Valley Parkway
Fredericks Center	1806 Auto Park Way
K-Mart	620 W. Mission Avenue
North County Fair	201 E. Via Rancho Parkway
Plaza Las Palmas	1050 W. Valley Parkway
Ralph's	1266 E. Valley Parkway
Safeway Center	1800 W. Nordahl
Schurgin Development	335 Del Dios Highway
Town and Country	1665 East Valley Parkway

(b) In addition to the requirements of subsection (a), no adult establishment, as defined in section 33-821 of this code, shall be located within five hundred (500) feet of any other adult establishment as defined by this code.

(c) The requirements of subsection (a) and (b) shall be in addition to any other relevant provision of the Escondido municipal code. (Zoning Code, Ch. 108, § 1082.3)

APPENDIX I

GEORGE H. EISER, III
City Attorney
CITY OF NATIONAL CITY
1243 National City Boulevard
National City, CA 92050
(619) 336-4220

Attorney for Plaintiffs

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

The PEOPLE OF THE STATE OF CALIFORNIA; CITY OF NATIONAL CITY, a municipal corporation, Plaintiffs, v. STEVEN D. WIENER; STEVEN D. WIENER dba CHUCK'S BOOKSTORE; PATRICIA SAUNDERS; DOES 1 through 30, inclusive, Defendants.	Case No. 578784 COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION (Filed Dec. 18, 1986)

Plaintiffs allege:

FIRST CAUSE OF ACTION

(Common Law Public Nuisance)

1. Defendant STEVEN D. WIENER is, and at all times herein mentioned was, a resident of the County of San Diego, State of California.

2. Defendant PATRICIA SAUNDERS is, and at all times herein mentioned was, a resident of the County of San Diego, State of California.

3. Plaintiffs are ignorant of the true names and capacities of those defendants sued herein as DOES 1 through 30, inclusive, and therefore sues said defendants by such fictitious names. Plaintiffs will seek to amend this complaint to allege their true names and capacities when such are ascertained. Plaintiffs are informed and believe and thereon allege that defendants sued herein as DOES 1 through 30 are in some manner responsible for the events and happenings referred to herein.

4. This action is for injunctive relief to abate a public nuisance, brought in the name of plaintiff PEOPLE OF THE STATE OF CALIFORNIA, as authorized by Civil Code Section 3491 and by Code of Civil Procedure Section 731.

5. At all times mentioned, defendants have been the occupants, users, managers, owners or lessees of property located at 929 National City Boulevard, National City, California.

6. At all times herein mentioned, and since on or about December 10, 1986, defendants have occupied, used, managed, owned or leased the premises at 929 National City Boulevard in such a manner as to constitute a continuing public nuisance within the meaning of Civil Code Section 3479 and 3480, in that defendants' use of said premises unlawfully interferes with and is injurious to the orderly and planned use of land resources.

7. Said nuisance affects, at the same time, a considerable number of persons in the vicinity of the premises.

8. Representatives of plaintiffs have given notice to defendants of the interference and injuries caused by said nuisance, and have requested defendants to cease and desist from carrying on said nuisance, but defendants have refused, and continue to refuse, to refrain from committing said nuisance.

9. Defendants have threatened to and will, unless restrained by this court, continue said nuisance and will continue the acts herein complained of. Each and every such act has been and will be in violation of the rights of plaintiffs.

10. Plaintiffs have no plain, speedy, or adequate remedy at law, and injunctive relief is expressly authorized by Civil Code Section 3422 and by Code of Civil Procedure Sections 526 and 731.

11. Unless defendants are informed [sic] from continuing their course of conduct, plaintiffs, [sic] will be irreparably injured in an amount which cannot be calculated in terms of money.

SECOND CAUSE OF ACTION

(Statutory Nuisance)

12. Plaintiffs hereby reallege and incorporate by reference each and every allegation of Paragraphs 1 through 11, inclusive, of the First Cause of Action.

13. Beginning on or about December 10, 1986, several violations of the National City Municipal Code have

existed on or about defendants' premises at 929 National City Boulevard. Specifically, defendants have occupied the premises at 929 National City Boulevard as an adult book store, as defined in Section 18.69.020(c) of the National City Municipal Code, although said use is prohibited as being within 1500 feet of an existing adult business, within 1500 feet of a park, and within 1000 feet of a residential zone, pursuant to Section 18.69.030 of the National City Municipal Code. Additionally, defendants have occupied the aforementioned premises in violation of the following provisions of the Municipal Code:

Section 18.120.020	(Occupying a building without an occupancy permit)
Secton [sic] 18.62.020	(Establishing signs without site plan review and building permits)
Section 6.04.040	(Transacting business without a business license).

14. Defendants have refused, and continue to refuse to cease and desist from the proposed unlawful use of the premises at 929 National City Boulevard, and defendants have threatened to and will, unless restrained by this court, commit a violation of Sections 18.69.030, 18.120.020, 18.62.020 and 6.04.040 of the National City Municipal Code.

15. Government Code Section 38771 enables a legislative body, by ordinance, to declare what constitutes a public nuisance.

16. Defendants' operation and use of their premises at 929 National City Boulevard in violation of the aforementioned code provisions constitutes a statutory public

nuisance pursuant to Section 1.20.020 of the National City Municipal Code, which provides:

> "*1.20.020 Violation a Public Nuisance.* In addition to the other penalties provided in this code, any condition caused or permitted to exist in violation of any of the provisions of this Code shall be deemed a public nuisance and may be, by this city, summarily abated and/or enforced by civil action, and each day such condition continues shall be regarded as a new and separate offense."

WHEREFORE, plaintiffs pray judgment as follows:

1. For a declaration that the business operated as an adult book store at 929 National City Boulevard, National City, constitutes a public nuisance.

2. That an order issue requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action.

3. That the court issue a temporary restraining order. [sic] a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and all persons acting on their behalf, from establishing, maintaining or operating an adult business, including an adult book store, at 929 National City Boulevard, National City.

4. For an order of this court directing defendant forthwith to comply with the National City Municipal Code.

5. For costs of suit.

6. For such other and further relief as the court deems proper.

Dated: 12-16-86.

/s/ George H. Eiser, III
GEORGE H. EISER, III
City Attorney
Attorney for Plaintiffs

APPENDIX J

ORDER GRANTING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One,
No. D010801 - S020887

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

STEVEN D. WIENER, Appellant

(Filed May 30, 1991)

Petition for review GRANTED.

Application for stay denied.

The issues to be argued before this court shall be limited to whether National City Municipal Code section 18.69.030 is unconstitutional on its face or as applied to the defendants' adult entertainment operation the City seeks enjoin [sic] at its present location.

Lucas
Chief Justice

Broussard
Associate Justice

Panelli
Associate Justice

Baxter
Associate Justice

Associate Justice

Associate Justice

Associate Justice

APPENDIX K

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO INC.; E.W.A.P., INC.; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION, *Plaintiffs-Appellees.* v. CITY OF LOS ANGELES, *Defendant-Appellant.*	No. 91-55865 D.C. No. CV-88-7838-RG ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California,
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
October 6, 1992 – San Francisco, California

Filed March 22, 1993
Amended April 27, 1993

Before: Dorothy W. Nelson, Stephen Reinhardt, Circuit Judges and Marion J. Callister, District Judge.*

Opinion by Judge D.W. Nelson

COUNSEL

James K. Hahn, Claudia McGee Henry and L. Wayne Mooney, Deputy City Attorneys, Los Angeles, California, for the defendant-appellant.

G. Randall Garrou, John H. Weston, Weston, Sarno, Garrou & DeWitt, Los Angeles, California, for the plaintiffs-appellees.

OPINION

D.W. NELSON, Circuit Judge:

The City of Los Angeles ("City") appeals the district court's grant of a preliminary injunction prohibiting the City from enforcing its Adult Entertainment Business Zoning Ordinance, Los Angeles Municipal Code § 12.70, against the Appellees, owners of adult entertainment businesses ("Adult Businesses"). We affirm the order of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1977, the City Department of Planning conducted a study which found that concentrations of adult entertainment businesses were creating blight in the neighborhoods where the businesses were located. In response,

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* The Honorable Marion J. Callister, Senior United States District Judge for the District of Idaho, sitting by designation.

the City enacted Municipal Code § 12.70 in 1978. Section 12.70 prohibits adult businesses from being established, substantially enlarged, or subject to transfer of ownership within 500 feet of churches, schools, parks, or within 1,000 feet of other adult businesses. The ordinance was enacted to prevent the "continued erosion of the character of the affected neighborhoods of the City" as described by the 1977 study.

Effective May 13, 1983, the City enacted Ordinance No. 157,538 which amended § 12.70B by adding the provision that each adult business was to be considered a separate business even if it operated in conjunction with a similar business at the same establishment. In addition, the ordinance amended § 12.70C to prohibit the maintenance of more than one adult business in the same building or structure. The ordinance, however, allowed multiple businesses established on or after September 1, 1978 to continue to operate until March 10, 1985, with an additional provision respecting the "grandfathering" of businesses established before September 1, 1978.

Effective January 13, 1984, the city council passed Ordinance No. 158,579, which forbade the establishment of any new adult business within 500 feet of any residential zone. Finally, Ordinance No. 161, 111, enacted in 1986, prohibited the continued operation after March 6, 1988 of adult businesses located within 500 feet of a residential zone. The 1986 ordinance also provided for the continued operation of such businesses whenever "a site consistent with 12.70C is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." A business existing on March 6, 1986 could continue to operate until March 6,

1991 if the business could establish undue financial hardship based on investment or the existence of a written lease extending past March 6, 1988.

The Adult Businesses[1] filed a joint complaint and separate individual complaints challenging the constitutionality of zoning ordinance § 17.70 [sic]. They also brought three separate motions requesting a preliminary injunction against the City's enforcement of the ordinance.[2]

Without distinguishing among the three motions, the district court ruled from the bench on June 17, 1991 that plaintiffs had met the criteria for a preliminary injunction, and enjoined the City from enforcing the ordinance.

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[1] Many of the plaintiffs own adult bookstores and at least two own an adult cabaret and two adult theatres.

[2] The first motion joined by all twenty-two plaintiffs argued that the residency restriction: a) denied adult businesses a reasonable opportunity to relocate their businesses and thus infringed upon the plaintiffs' and the public's First Amendment rights; and b) improperly applied retroactively to pre-existing businesses. The second motion, joined by Brand X Video, Inc., Stuart Parr, New, Inc., E.W.A.P. Inc., N.F.M. Corp., Alex Wyszomirski, Beverly Books, Inc., Whitey, Inc. and Hardrock, Inc., alleged that the portion of § 12.70 which treats as separate businesses those stores which the City classifies as "multiple use" businesses: a) violates the First Amendment by indirectly outlawing certain forms of expression such as adult arcades that cannot economically operate except in conjunction with a related retail business; and b) violates the Equal Protection Clause. The third motion, joined by all twenty-two plaintiffs, argued that the ordinance is unconstitutionally vague in its definition of what constitutes an "adult" retail business.

STANDARD OF REVIEW

The City raises the preliminary issue of the Adult Businesses' standing to assert the First Amendment rights of the general public. We review standing questions *de novo*. *Conti v. City of Fremont*, 919 F.2d 1385, 1387 (9th Cir. 1990). A district court's grant or denial of a preliminary injunction will be reversed only where the district court either abused its discretion or based its decision on an erroneous legal standard. *Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309 (9th Cir.) *cert. denied*, 485 U.S. 993 (1989). Under an abuse of discretion standard, this court cannot reverse the district court's grant of a preliminary injunction unless it has a "definite and firm conviction" that the district court committed a "clear error of judgment in the conclusion it reached." *Abatti v. Commissioner*, 859 F.2d 115, 117 (9th Cir. 1988).

ANALYSIS

I. Adult Businesses' Standing

The City contends the Adult Businesses are without standing in this court since they cannot employ the First Amendment rights of the public as a ground for the issuance of the preliminary injunction. While the Adult Businesses argue in their first motion for a preliminary injunction that enforcement of the ordinance will deny the public access to the type of entertainment they sell, the crux of their argument is that the ordinance infringes upon their *own* First Amendment rights. They argue that § 12.70 suppresses their protected speech by failing to

provide them with reasonable alternative relocation sites for their businesses. Because the Adult Businesses have standing to protect their personal First Amendment rights, we need not decide whether they possess standing to assert the First Amendment rights of the public to have access to the types of expression sold by these businesses.

II. The Preliminary Injunction

In support of their motions for a preliminary injunction, the Adult Businesses argue that the City has provided them with an insufficient number of possible relocation sites and that therefore enforcement of the ordinance would cause them hardship and irreparable injury. The Adult Businesses also argue that the ordinance raises serious questions of law. The City contends that all the evidence presented by the Adult Businesses regarding their threat of hardship went to the degree of economic harm they will face if the ordinance is enforced, and that the district court abused its discretion in considering this evidence since economic harm is not relevant to the issue of whether the Adult Businesses' First Amendment rights are threatened. The City also contends that the district court erred in finding that this case presented serious questions of law since the ordinance in question is constitutional on its face.[3]

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[3] The district court's preliminary injunction expressly found that the adult businesses had raised "substantial and non-frivolous legal and factual issues" and that "the balance of hardships tips decidedly in favor of plaintiffs."

In the context of location-restrictive ordinances, this circuit has determined that a preliminary injunction should issue upon a clear showing of either: (1) probable success on the merits and irreparable injury; or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief. *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1351 (9th Cir. 1985); *Ebel v. City of Corona*, 698 F.2d 390, 392 (9th Cir. 1983).

These are not two separate tests, but "merely extremes of a single continuum." *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Thus, a moving party need not demonstrate that he risks irreparable injury, but he must at least show that he will suffer a degree of hardship that outweighs the hardship facing the opposing party if the injunction is not issued. Similarly, a moving party need not demonstrate that he will succeed on the merits, but must at least show that his cause presents serious questions of law worthy of litigation.

A. *Economic Impact Under Renton*

The question of purely economic injury is not relevant to the issue of whether a moving party faces hardship if a restrictive zoning ordinance is enforced. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). Rather, a lower court may only consider whether enforcement of the ordinance is likely to impugn the moving party's First Amendment rights. But, "[a]ny

loss of First Amendment freedoms, even briefly, can constitute irreparable injury." *Id.* 745 F.2d at 1214; *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

1. *The Renton Test*

The test for determining whether the Adult Businesses' First Amendment rights are threatened is whether a local government has "effectively den[ied] . . . [the Adult Businesses] a reasonable opportunity to open and operate" their enterprise within the city in question. *City of Renton, et al. v. Playtime Theatres*, 475 U.S. 41, 54 (1985). Again, the possible economic impact upon a business is not a factor to be considered by the courts when determining whether a city has provided a business with a reasonable alternate location. Adult businesses:

> must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. . . . [A]lthough we have cautioned against the enactment of zoning regulations that have the 'effect of suppressing or greatly restricting access to lawful speech,' . . . we have never suggested that the First Amendment compels the Government to ensure that Adult theaters . . . will be able to obtain sites at bargain prices. . . .

Id. at 54 (citations omitted). This prohibition against consideration of economic impact specifically forecloses inquiry into whether a relocation site is "commercially viable" or only "potentially" as opposed to "actually" available. *Id.* at 53.

The Supreme Court, however, has not stated what sort of factors *may* be considered when deciding whether the relocation sites provided by a city are reasonable. Some courts have attempted to draw a distinction between economically unsuitable land and physically or practically unsuitable land. *See Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir.) (per curiam) *modifying* 950 F.2d 255 (5th Cir.), *cert. denied*, 113 S.Ct. 304 (1992); *Alexander v. City of Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991). In *Woodall*, the Fifth Circuit held that "land with physical characteristics that render it unavailable for any kind of development . . . may not be considered available for constitutional purposes under *Renton*." 959 F.2d at 1306.

The problem, however, is that the distinction between economically unsuitable and physically or practically unsuitable land is difficult to maintain. Nearly all forms of physical and legal unsuitability may be couched in terms of economic unsuitability. Conversely, problems of economic suitability may be couched in terms of physical unsuitability. For example, in the instant case, some of the definitionally "available" land is currently used as runways for the Los Angeles airport. One could argue that this land is physically unsuitable for a business. On the other hand, one could argue that it is merely economically unsuitable, since there is nothing to prevent an adult business from physically relocating to this site; rather it is prevented by a consideration of the cost of tearing down part of an airstrip and then building a storefront. In short, it could be argued that the only impediment is the cost of development.

This easily blurred line between economic and physical suitability creates doctrinal problems. If the unsuitability of a relocation site always can be couched in terms of economic suitability, under *Renton* no relocation site could ever be considered unreasonable. On the other hand, if a court attempts artificially to maintain the line between physical and economic suitability, it may often be led to consider the economic factor *sub rosa* which is forbidden under *Renton*.

2. *The Distinction Between Consideration of Economics Within and Without the Market*

A solution to this gordian knot appears once we consider the context in which the *Renton* court forbade consideration of economic factors. Astutely, the *Woodall* court noted that "[t]he Court [in *Renton*] obviously contemplated that there was a 'market' in which businesses could purchase or lease real property on which business could be conducted." 959 F.2d at 1305. We agree with the observation of the *Woodall* court. *Renton* assumed that the relocation sites were already part of the relevant real estate market. *See e.g., Walnut Properties Inc. v. City of Whittier*, 861 F.2d 1102, 1109 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989) (forbidding consideration of economic factors that stem from "market force").

Accordingly, we do not think that *Renton* forbids a court to consider economics when evaluating whether a particular relocation site is in fact part of the real estate market. For purposes of *Renton*, the distinction is between consideration of economic impact *within* an actual business real estate market and consideration of

cost to determine whether a specific relocation site *is part* of the relevant market. A court may not consider the former, but it may consider the latter when determining whether a specific site is reasonably suitable for the operation of a business.

3. *The Hardship Inquiry*

There are two questions then that must be answered when determining whether an adult business has been given a reasonable opportunity to relocate. The first question is whether relocation sites provided to a business may be considered part of an actual business real estate market. The second question is whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses.

The first question is the most tricky. For the reasons stated above, we do not find the distinction between economic suitability and physical suitability helpful in answering this question. Rather, we are left to the simple, yet slippery, test of reasonableness when attempting to discern whether land is or is not part of a market in which *any* business may compete. Inquiry into the question of whether it is reasonable to consider a particular location site as part of the commercial real estate market may focus either on the physical characteristics of an area or on the cost of altering or developing the area to change its physical characteristics.

The case law offers clues as to what sort of land and/or structures reasonably may be said to comprise the relevant real estate market. *Renton* found that the city had met its obligation to provide alternate locations by providing 520 acres of land consisting of "ample accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads." 475 U.S. at 41 [sic]. *Renton* did not mention, however, that part of the 520 acres offered to the adult businesses consisted of an oil tank farm, a horse racing track and a sewage treatment facility.

Subsequent to *Renton*, the Eighth Circuit in *Alexander* refused to consider economic impact but did consider whether there were potential *commercial* sites available. The *Alexander* court concluded that "numerous sites were potentially available . . . [since] under the ordinance theaters of this sort have access to at least 6.6% of the *total acreage of commercial land;* within the available areas are a myriad of block faces, each a potential relocation site." 928 F.2d at 283. In *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part vacated in part*, 493 U.S. 215 (1990), the district court restated the rule against consideration of economic impact. The court then cited with approval *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982), which held that areas located among warehouses, shipyards, undeveloped areas, and swamps did not provide adult businesses with a reasonable opportunity to relocate. 648 F.Supp. at 1071. In contrast, *Dumas* noted that the plan before it permitted relocation in areas with no "impediments" except for the possibility

that as a "matter of business judgment" these relocation sites were undesirable." [sic] *Id.; see also Function Junction, Inc. v. City of Daytona Beach*, 705 F.Supp. 544, 552 (M.D. Fla. 1987).

The courts' findings in these cases lead us to hold that a particular relocation site may be considered part of the relevant real estate market when the following conditions are met. First, although *Renton* stressed that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility. The Fifth Circuit has suggested that:

> [When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or *any other business enterprise.*

950 F.2d at 262. [sic][4]; *cf. Alexander*, 928 F.2d 278 ("the record clearly shows that other owners of adult businesses were able to find suitable relocation sites"). We need not determine whether the Fifth Circuit is correct. Here we need determine only that property is not "potentially" available when it is unreasonable to believe that it would ever become available to any commercial enterprise.

Second and focusing our attention on relocation sites which are within manufacturing or industrial zones,

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[4] *Woodall* modified its opinion on April 21, 1992. The Fifth Circuit, however, did not disturb that portion of the original opinion quoted above.

relocation sites that are reasonably accessible to the general public may also be part of the market. Third, areas in manufacturing zones which have a proper infra-structure such as sidewalks, roads and lighting may be included in the market. Fourth, when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market. While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business, potential sites must be reasonable relocation sites for some commercial enterprise before they can be considered part of the relevant market. Consequently, whether one defines a warehouse, a swamp, or a sewage treatment plant as physically or economically unsuitable, it is not reasonable to define these sites as part of the real estate market that any business would choose.[5]

Fifth, and most obvious, those relocation sites which are commercially zoned are part of the market.

We emphasize that assuming a relocation site is part of the relevant market, it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally.

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[5] We need not answer the question of whether, under *Renton*, a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered; in this case, the City has offered both commercial and non-commercial relocation sites.

B. *Adult Businesses' Hardship*

We turn now to the question of whether the district court in this case abused its discretion when it found that the Adult Businesses had met the hardship criterion for a preliminary injunction. The City argues that the district court improperly considered the commercial viability of the potential relocation sites for the Adult Businesses. We do not agree. The record in this case indicates that a real question exists about whether the ordinance provides the Adult Businesses with constitutionally sufficient alternative relocation sites for their businesses.

1. *Excluding Offered Sites under Renton From Relevant Market*

The first issue is whether the relocation sites offered by the City are part of the business real estate market.

The Adult Businesses' geographical expert, Michael Taugher, conducted an extensive survey of the City to determine which geographical areas within the City would be permissible as potential sites for establishing or relocating these adult businesses. Mr. Taugher found that there are 11,613.1 acres of what the parties call "definitionally available" relocation sites where the City would allow an adult business to exist. Out of these 11,613.1 acres, however, Mr. Taugher concluded that much of the land was not truly available.

Mr. Taugher based his findings on what he termed "physical" or "practical" considerations. He found the following: 1) thousands of potentially available acres are submerged beneath the Pacific Ocean or the outer harbor

of the Port of Los Angeles; 2) some of the land is presently being used as landing strips for the Los Angeles Airport; 3) two hundred acres are currently being used as landfill; 4) 600 acres are currently used as the Van Nuys airport; 5) 4,357.51 acres are currently used by the Port of Los Angeles and/or oil refineries; and 6) about 230 acres are used for petroleum gas storage. In addition, he found that the ITT Gilfillian Defense plant, the General Motor Assembly plant, a portion of Children's Hospital as well as other large businesses or institutions are located on "definitionally available" sites. He concluded that out of the 11613.1 acres of definitionally available land, only 7440.9 acres are "realistically available" for an adult business. Only 0.18% of this realistically available land is in a commercial zone.

Bruce Bailey, a real estate expert employed by the Appellees, used criteria similar to Mr. Taugher's. Mr. Bailey excluded those relocation sites that he considered physically inadequate such as parcels of land now occupied by junk yards, steel yards and car storage lots. He also excluded parcels of land that were occupied by "single purpose buildings" such as shipping yards, the Los Angeles airport, and a large oil refinery complex (*id.*). Mr. Bailey concluded that there were perhaps 120 "potentially viable" relocation sites that met the requirements of the zoning ordinance.

The City contends that these experts arrived at their conclusions by considering: 1) the commercial viability of the relocation sites; and 2) whether these sites were actually as opposed to potentially available. The City is correct that at times Mr. Bailey improperly considered factors such as whether relocation sites were operatively

expensive or whether adult businesses would not be welcomed by landlords. Notwithstanding this, Mr. Bailey's final estimation of available relocation sites resulted from his reliance on factors other than commercial viability.

Applying the factors we have enumerated above, we believe that the areas eliminated from consideration by Mr. Taugher and Mr. Bailey are properly excluded under *Renton* since these areas do not fall within the relevant market. First, much of the land the Adult Businesses' experts considered unsuitable land is not potentially available. Land under the ocean, airstrips of international airports, and sports stadiums are not relocation sites likely to ever become available to the Adult Businesses, or indeed to any commercial business. Second, and turning to those relocation sites which are located in manufacturing zones, many of the areas excluded by Appellees' experts are not readily accessible to the public. Third, many of the sites the Adult Businesses' experts found to be unsuitable are inadequate for any generic commercial business. While *Renton* did not consider *undeveloped* land to be unsuitable for relocation, the Adult Businesses' experts testified that the City here has provided the Adult Businesses relocation sites that are *developed* in a manner totally incompatible with *any* average commercial business. Fourth, many of the excluded relocation sites appear to lack a proper infra-structure. In short, aside from the question of commercial viability, it is unreasonable to consider the acreage eliminated from consideration by the Adult Businesses' experts as relocation sites that fall within the business real estate market.

2. *The Sufficiency of the Relocation Sites Within the Market*

Once the areas that are not part of the market are excluded, the question becomes whether the remaining acreage provides the Adult Businesses with a reasonable opportunity to relocate. The parties agree that there are presently 102 different adult entertainment businesses in the city of Los Angeles. Of these 102 existing businesses, the City located five which it believed to be in compliance with all of the various restrictions of § 12.70. The Adult Businesses' expert Mr. Taugher concluded that all but one of the 102 adult entertainment businesses could not meet the requirements of the ordinance.

At first glance, the 120 sites deemed practically available by Mr. Bailey would appear to be constitutionally sufficient, given that there are approximately only 102 adult businesses now in operation in the City of Los Angeles. Yet a more careful analysis of the evidence suggests otherwise. First, the number of businesses that need to relocate may be well higher than 102 since under the ordinance, single stores that sell two sorts of adult entertainment are to be considered multiple businesses and thus cannot operate at a single location.

Second, the estimation of the quantity of sites available within the market may well be inaccurate. Like the ordinance considered in *Walnut Properties Inc.*, 861 F.2d 1102 (9th Cir. 1989), this ordinance imposes a 1,000 foot separation requirement between any two adult businesses. This means, however, that as soon as any particular site is occupied by a new adult business, any other adult entertainment business is automatically precluded

from relocating upon any other definitionally available plot within a contiguous 72 acre circle around the first business.

Mr. Taugher did not work out how much acreage was available after the 1,000 foot restriction was factored in to his evaluation. However, since many of the definitionally available areas were adjacent to each other, he concluded that acreage available to the tenth or twentieth business to relocate would be "dramatically less" than the percentage of area definitionally available to the first adult business. We have not estimated the number of sites available in either the commercial or the manufacturing zones of the city. However, it is clear from the map in the record that once the 500 foot residential restriction is factored in, the definitionally available locations are clustered together in several parts of the City. There is no doubt that the 1000 foot restriction between any two adult businesses would severely reduce the actual number of potentially available relocation sites. In addition, Mr. Taugher testified that he was not sure of the accuracy of his estimate of definitionally available sites. He did not determine whether portions of existing structures that were within a "definitionally permissible" area fell within a prohibited zone.

A corollary point is that there is a possibility that some of the sites included in the relevant market may be included improperly. If so, this also would reduce the number of reasonable sites potentially available. While Mr. Taugher roughly estimated the amount of land that could be considered "physically" or "practically" available, he did not determine whether there was a further

decrease in available land due to factors such as inaccessability [sic], lack of proper infra-structure such as lighting, road and sidewalk access, or the presence of other disabling characteristics of the site. In sum, a risk exists that a comparison between the estimation of the total number of adult businesses and the total available acreage is misleading.

Therefore, the district court did not abuse its discretion in finding that there would be serious hardship to the Adult Businesses if an injunction against enforcement of the ordinance was not granted.

C. *City's Hardship*

Given that the Adult Businesses must not only show hardship, but that hardship tips in their favor, we turn now to the question of the potential injury to the City if the ordinance is not enforced. In *Lydo Enterprises*, this court presumed that an injunction which prevents a city from enforcing its ordinances *a fortiori* causes the City harm since "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 745 F.2d at 1213 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)). In this instance, however, the district court found that any harm the City might suffer was slight. The court noted that there had already been a "forebearance of enforcement of this regulation for a long time," implying that the City itself did not perceive enforcement of the regulation to be a matter of great urgency.

On this record, we cannot say that the district court abused its discretion in finding that the balance of hardship tipped sharply in the Adult Businesses' favor.

D. *Serious Questions of Law*

Next, we turn to the question of whether the district court erred in concluding that this case presents serious questions of law. The City argues that the district court erred because the ordinance is constitutional on its face and plaintiffs have failed to present evidence to raise any serious doubt to the contrary. We disagree. We have already concluded that the record indicates that the City may not have provided the Adult Businesses with reasonable alternative avenues of expression. This is a constitutional question which by definition is a "fair ground for litigation." *Adultworld Bookstore*, 758 F.2d at 1351. Moreover, this circuit considers zoning ordinance cases such as this to "present complex constitutional problems." *Id.* In this particular instance, the presumption of complexity is justified given that the answer to the question of what constitutes a "reasonable opportunity to open and operate" an adult business is not free from ambiguity.

III. Attorneys' Fees

The Adult Businesses request an award of attorneys fees pursuant to 42 U.S.C. § 1988 should they prevail on appeal. Section 1988 provides that attorney fees may be awarded to a prevailing party in an action to enforce a provision of 42 U.S.C. § 1983. While the award of fees is discretionary, a court is expected to award such fees to

the prevailing party unless there is some special circumstance which would justify the court's refusal. No such special circumstances exist in this case. Accordingly, we award the Adult Businesses attorneys' fees.

CONCLUSION

We conclude that the district court did not abuse its discretion in finding that the balance of hardships tips sharply in favor of the Adult Businesses. We agree with the district court that the ordinance presents serious questions of law. Accordingly, the decision of the district court to issue a preliminary injunction is affirmed. The Adult Businesses are to be awarded attorneys' fees.

AFFIRMED.